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THE

LAW REPORTS.

Exchequer Division.

REPORTED BY

JAMES M. MOORSOM AND ALEXANDER MORTIMER,
BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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283	11, from bottom	"does necessarily include"	"does not necessarily include."

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Ahearn *v.* Bellman	(C. A.)	201
Amersham Burial Board, Crowhurst *v.*		5
Attorney General *v.* Constable		172

B.

Barker, Ray *v.*	(C. A.)	279
Bellman, Ahearn *v.*	(C. A.)	201
Beynon *v.* Godden	(C. A.)	246
Black *v.* Homersham		24
Bouch *v.* Sevenoaks Railway Company		133
Box *v.* Jubb		76
Brighton Aquarium Company, Girdlestone *v.*	(C. A.)	107
Brighton Railway Company *v.* St. Giles, Camberwell		239
Brown, Donovan *v.*		148
Buckton *v.* Higgs		174

C.

		PAGE
Clarke, Neale *v.*		286
Cobbold *v.* Pryke		315
Cole *v.* Firth		301
Collett *v.* Dickenson		279, 285
Commissioners of Inland Revenue, Wale *v.*		270
Constable, Attorney General *v.*		172
Cook, Jakeman *v.*		26
Cooper *v.* London and Brighton Railway Company		88
Coppock, Midgley *v.*	(C. A.)	309
Crowhurst *v.* Amersham Burial Board		5
Cwmorthen Slate Company, Limited, Jones *v.*		97

D.

Davey *v.* Shannon		81
Davies *v.* Felix	(C. A.)	32
—— *v.* McVeagh	(C. A.)	265
Davis *v.* Godbehere	(C. A.)	215

PAGE

Defries, Myers *v.* (C. A.) 176
Dennis *v.* Seymour 80
Dickenson, Collett *v.* 279, 285
Donovan *v.* Brown 148
Dutton, Re 54

F.

Fairclough *v.* Marshall (C. A.) 37
Felix, Davies *v.* (C. A.) 32
Firth, Cole *v.* 301
Forbes *v.* Lee Conservancy Board 116
Freeland, Postlethwaite *v.* (C. A.) 155

G.

Galatti *v.* Wakefield (C. A.) 249
Gardner *v.* Irvin (C. A.) 49
Girdlestone *v.* Brighton Aquarium Company (C. A.) 107
Godbehere, Davis *v.* (C. A.) 215
Godden, Beynon *v.* (C. A.) 246
Godfrey, Woodgate *v.* 59
Grant, Household Fire Insurance Company *v.* (C. A.) 216
Greaves *v.* Keene 73
Gregson *v.* Potter 142
Guerin, Hancock *v.* 3

H.

Hancock *v.* Guerin 3
Higgs, Buckton *v.* 174
Hiort *v.* London and North Western Railway Company (C. A.) 188
Holdsworth, Whitehead *v.* 13
Homersham, Black *v.* 24
Hough *v.* Manzanos 104
Household Fire Insurance Company *v.* Grant (C. A.) 216
Hunter *v.* Young (C. A.) 256

I.

Insley *v.* Jones 16
Irvin, Gardner *v.* (C. A.) 49

J.

PAGE

Jakeman *v.* Cook 26
Jones *v.* Cwmorthen Slate Company, Limited 97
——, Insley *v.* 16
Jubb, Box *v.* 76

K.

Keene, Greaves *v.* 73

L.

Lawrence, Siddons *v.* (C. A.) 176
Lee Conservancy Board, Forbes *v.* 116
Leftly *v.* Monnington 307
Lewis, Thomas *v.* 18
London and Brighton Railway Company, Cooper *v.* 88
London and North Western Railway Company, Hiort *v.* (C. A.) 188
Louth and East Coast Railway Company, Shelford *v.* (C. A.) 317

M.

McVeagh, Davies *v.* (C. A.) 265
Malton Board of Health *v.* Malton Manure Company 302
Malton Manure Company, Malton Board of Health *v.* 302
Manzanos, Hough *v.* 104
Marshall, Fairclough *v.* (C. A.) 37
Midgley *v.* Coppock (C. A.) 309
Mitcham Gas Light Company, Wells *v.* 1
Monnington, Leftly *v.* 307
Myers *v.* Defries (C. A.) 176

N.

Neale *v.* Clarke 286
New Zealand Shipping Company, Wright *v.* (C. A.) 165

P.

PAGE

Petre, Webster *v.* 127
Postlethwaite *v.* Freeland (C. A.) 155
Potter, Gregson *v.* 142
Pryke, Cobbold *v.* 315

R.

Ray *v.* Barker (C. A.) 279
Read, Riley *v.* 100
Reg., Tomline *v.* (C. A.) 252
Riley *v.* Read 100
Runtz *v.* Sheffield (C. A.) 150

S.

St. Giles, Camberwell, Brighton Railway Company *v.* 239
Sevenoaks Railway Company, Bouch *v.* 133
Seymour, Dennis *v.* 80
Shannon, Davey *v.* 81
Sheffield, Runtz *v.* (C. A.) 150
Shelford *v.* Louth and East Coast Railway Company (C. A.) 317

PAGE

Siddons *v.* Lawrence (C. A.) 176
Swansea Bank *v.* Thomas 94

T.

Terraz, Ex parte 63
Thomas *v.* Lewis 18
———, Swansea Bank *v.* 94
Tomline *v.* Reg. (C. A.) 252

W.

Wakefield, Galatti *v.* (C. A.) 249
Wale *v.* Commissioners of Inland Revenue (C. A.) 270
Webster *v.* Petre 127
Wells *v.* Mitcham Gas Light Company 1
Whitehead *v.* Holdsworth 13
Woodgate *v.* Godfrey 59
Wright *v.* New Zealand Shipping Company (C. A.) 165

Y.

Young, Hunter *v.* (C. A.) 256

TABLE OF CASES CITED.

A.

		PAGE
Adams *v.* Lindsell	1 B. & A. 681	219, 220
—— *v.* Royal Mail Steam Packet Company	5 C. B. (N.S.) 492	167, 170
Aldred's Case	9 Rep. 57 b	11
Alsopp *v.* Day	7 H. & N. 457	61
Arthur *v.* Hughes	4 Beav. 506	259
Ashcroft *v.* Crow Orchard Colliery Company, Limited	Law Rep. 9 Q. B. 540	159, 267, 268, 269
—— *v.* Foulkes	18 C. B. 261	288, 294
Attorney General *v.* Barker	Law Rep. 7 Ex. 177	173, 174
—— *v.* Hallett	15 M. & W. 97	173
—— *v.* St. Aubyn	Wigh. 167	173

B.

Baker *v.* Oakes	2 Q. B. D. 171	178, 179, 186
Bank of Montreal *v.* Cameron	2 Q. B. D. 536	318, 320
Barker *v.* Highley	15 C. B. (N.S.) 37	20
Beeston *v.* Collyer	4 Bing. 309	86
Beswick *v.* Capper	7 C. B. 669	296
Bettini *v.* Gye	1 Q. B. D. 183	91
Betts *v.* Burch	4 H. & N. 506	91
Blake *v.* Appleyard	3 Ex. D. 195	286, 300
Bowey *v.* Bell	4 Q. B. D. 95	178
Boydell *v.* Drummond	11 East, 142	83
Brierly *v.* Kendall	17 Q. B. 937	199
British and American Telegraph Company *v.* Colson	Law Rep. 7 Ex. 108	221, 222, 225, 228, 230, 231, 232, 237
Brogden *v.* Directors of Metropolitan Railway Company	2 App. Cas. 666, 691	223, 233
Broughton's Case	3 Co. Rep. pt. 5, 23 b	130
Brown *v.* Dale	9 Ch. D. 78	56
—— *v.* Johnson	10 M. & W. 331	267, 268, 269
Bull, Re	15 L. J. (Q.B.) 235	65
Burroughes *v.* Bayne	5 H. & N. 296	194

C.

Campbell *v.* Stein	6 Dow, 135	21
Carne *v.* Long	2 D. F. & J. 75; 29 L. J. (Ch.) 503	56, 57, 58

		PAGE
Carstairs *v.* Taylor	Law Rep. 6 Ex. 217	78, 79
Cashin *v.* Cradock	2 Ch. D. 140	4
Caudle *v.* Seymour	1 Q. B. 389	66
Cawthorne *v.* Campbell	1 Anstr. 205	173
Chinery *v.* Viall	5 H. & N. 288	199
Clark's Trusts, In re	1 Ch. D. 497	57
Clegg *v.* Rowland	Law Rep. 3 Eq. 368	259, 261, 263, 264
Cleveland (Duchess of) *v.* Meyrick	37 L. J. (Ch.) 125	98, 99
Cocks *v.* Manners	Law Rep. 12 Eq. 574	56, 58
Cole, Marchant & Co. *v.* Firth	4 Ex. D. 301	300
Cooke *v.* Wilson	1 C. B. (N.S.) 153	105
Cooper, Ex parte. Re Baum	10 Ch. D. 313	61, 62
Cote, Ex parte	Law Rep. 9 Ch. 27	218
Cowell *v.* Amman Colliery Company	6 B. & S. 333	250, 289, 294
Crom *v.* Samuels	2 C. P. D. 21	150, 154
Croomes *v.* Gore	1 H. & N. 15; 25 L. J. (Ex.) 267	2, 3
Cross, Ex parte	2 H. & N. 354	65

D.

Dauncey, Ex parte	8 Jur. 829	65
De Gendre *v.* Kent	Law Rep. 4 Eq. 283	25
Deykin *v.* Coleman	36 L. T. 195	151
Doe *v.* Geekie	13 L. J. (Q.B.) 239	203
—— *v.* Jackson	Dougl. 175	202
Duncan *v.* Topham	8 C. B. 255	220, 228, 232
Dunlop *v.* Higgins	1 H. L. C. 381	217, 218, 219, 220, 221, 222, 225, 227, 228, 230, 231, 237, 238
Dunmore *v.* Alexander	9 Shaw & Dunlop, 190	218

E.

Eley *v.* Positive, &c., Assurance Company	1 Ex. D. 20, 88	84, 85
Erskine *v.* Adeane	Law Rep. 8 Ch. 756	12
Etty *v.* Wilson	3 Ex. D. 359	34
Evans *v.* Williams	1 Cr. & M. 30	28

F.

Farrington *v.* Donohoe	Ir. Rep. 1 C. L. 675	83, 85
Fenton *v.* Emblers	3 Burr. 1278, 1281	83, 86
Finucane's Case	17 W. R. 813	229, 232
Firth *v.* Bowling Iron Company	3 C. P. 254	12
Fletcher *v.* Rylands	Law Rep. 1 Ex. 279	10, 11, 12
Ford *v.* Cotesworth	Law Rep. 4 Q. B. 127	160, 167, 170
Fordham *v.* Wallis	10 Hare, 217	261
Forrest *v.* Davis	Weekly Notes, 1878, at p. 88	151
Forshaw *v.* De Wette	Law Rep. 6 Ex. 200	250
Foster *v.* Usherwood	3 Ex. D. 1	286, 289, 294

G.

		PAGE
Gadd *v.* Houghton	1 Ex. D. 357	105, 106
Galloway *v.* Mayor of London	Law Rep. 1 H. L. 34	245
Garnett *v.* Bradley	3 App. Cas. 944	176, 179, 286
General Steam Navigation Company *v.* London and Edinburgh Shipping Company	2 Ex. D. 467	178, 179, 186
Gilbert *v.* Sykes	16 East, at p. 152	83
Great Western Railway Company *v.* Bishop	Law Rep. 7 Q. B. 550	303, 305, 306
——— *v.* Reg.	1 E. & B. 874	120
Gunn's Case	Law Rep. 3 Ch. 40	218

H.

Hall *v.* Palmer	3 Hare, 532	261
Hallums *v.* Hills	24 W. R. 956	151, 152, 154
Harris' Case	Law Rep. 7 Ch. 587	219, 220, 222, 224, 225, 231, 237
Hartnell *v.* Ryde Commissioners	4 B. & S. 361	125
Hastings, Corporation of *v.* Ivall	Law Rep. 8 Ch. 1017	52
Heather *v.* Webb	2 C. P. D. 1	28, 30
Hebb's Case	Law Rep. 4 Eq. 12	221, 222
Higgins *v.* Harding	Law Rep. 8 Q. B. 7	241
Hinton *v.* Sparkes	Law Rep. 3 C. P. 161	93
Holme *v.* Brunskill	3 Q. B. D. 495	130, 130

J.

Johnson *v.* Lancashire and Yorkshire Railway Company	3 C. P. D. 499	193
Jones *v.* Phelps	20 W. R. 92	30

K.

Kearon *v.* Pearson	7 H. & N. 386	268
Kell *v.* Anderson	10 M. & W. 498	268, 269
Kidson *v.* Turner	3 H. & N. 581; 27 L. J. (Ex.) 492	28
Kirkwood *v.* Webster	9 Ch. D. 239	2
Knowlman *v.* Bluett	Law Rep. 9 Ex. 1, 307	83, 87
Krans, Ex parte	1 B. & C. 258	65, 67, 71

L.

Lambert *v.* Bessey	Sir T. Raym. 421	11
Langridge *v.* Campbell	2 Ex. D. 281	175
Lant *v.* Peace	8 Ad. & E. 248	276
Lawrence *v.* Jenkins	Law Rep. 8 Q. B. 274	12
Lawson *v.* Burness	1 H. & C. 396	160
Lee *v.* Whitaker	Law Rep. 8 C. P. 70	91

		PAGE
Leidemann *v.* Schultz	14 C. B. 38	160
Leonard *v.* Rogers	Wight. 204	173
London *v.* Roffey	3 Q. B. D. 6	216
London and North Western Railway Company *v.* St. Pancras	17 L. T. (N.S.) 654	243, 245
London Tramways Company *v.* Bailey	3 Q. B. D. 217	91

M.

Manson *v.* Thacker	7 Ch. D. 620	312, 314
March *v.* Russell	3 My. & Cr. 31	253
Mercier *v.* Cotton	1 Q. B. D. 442	4
Mersey Docks Trustees *v.* Gibbs	Law Rep. 1 H. L. 93	123, 124
Minet *v.* Morgan	Law Rep. 8 Ch. 361	51, 52
Moone *v.* Rose	Law Rep. 4 Q. B. 486	75, 76
Moore *v.* Smith	1 E. & E. 597	173
—— *v.* Watson	Law Rep. 2 C. P. 314	250, 251, 252, 289, 294
Moss *v.* Sweet	16 Q. B. 493	281, 282, 283, 284
Muirhead *v.* Direct States Cable Company	27 W. R. 708	217
Mulliner *v.* Florence	3 Q. B. D. 484	193
Murphy *v.* O'Sullivan	11 Ir. Jur. (N.S.) 111	83

N.

National Funds Assurance Company	4 Ch. D. 305	149
Newport Bridge, Re	2 E. & E. 377	125
Nicholls *v.* Marsland	Law Rep. 10 Ex. 255	79, 79
Noble *v.* Brett	24 Beav. 499	258

O.

Odell, Ex parte. Re Walden	10 Ch. D. 76	61, 62
Oglesby *v.* Yglesias	E. B. & E. 930	105, 106
Ohrby *v.* Ryde Commissioners	5 B. & S. 743	125
Osborne *v.* Homburgh	1 Ex. D. 48	289, 294

P.

Paice *v.* Walker	Law Rep. 5 Ex. 173	105, 106, 107
Parker *v.* Lewis	Law Rep. 8 Ch. 1035	130
Parnaby *v.* Lancaster Canal Company	11 A. & E. 223	122, 123, 124
Pellatt's Case	Law Rep. 2 Ch. 527	218
Peter *v.* Compton	1 Sm. L. C. 5th ed. 283	83
Phipps, Ex parte	11 W. R. 730	65
Pickering *v.* Rudd	1 Stark, 56	8
Pierce *v.* Fothergill	1 Hodges, 251	17
Pillott *v.* Wilkinson	2 H. & C. 72	194
Pitt *v.* Pursord	8 M. & W. 538	130
Poole *v.* Shergold	1 Cox, 273	25
Potter *v.* Chambers	4 C. P. D. 457	286, 292, 300
—— *v.* Sanders	6 Hare 1	222
Pound *v.* Plumstead Board of Works	Law Rep. 7 Q. B. 183.	245

R.

		PAGE
Randall *v.* Lynch	2 Camp. 352	155, 268, 269
Ranelaugh *v.* Hayes	1 Vern. 189	130
Reg. *v.* Tottenham	4 Q. B. D. 367	308
Reidpath's Case	Law Rep. 11 Eq. 86	218
Rex *v.* Bretteil	3 B. & Ad. 425	99
— *v.* Despard	7 T. R. 736	69
— *v.* Gourlay	7 B. & C. 669	70
— *v.* Marks	3 East, 157	65, 71
— *v.* Sedgley (Inhabitants of)	2 B. & Ad. 65	98
Ridley *v.* Ridley	34 L. J. (Ch.) 462	83, 86
Roberts *v.* Tucker	3 Ex. 632	83, 85
Robinson *v.* Read	9 B. & C. 449	20
Rodway *v.* Lucas	10 Ex. 667; 24 Law J. (Ex. D.) 155	17
Runnacles *v.* Mesquiter	1 Q. B. D. 416	281, 285
Rushby *v.* Newson	Law Rep. 10 Ex. 322	102
Rylands *v.* Fletcher	3 H. L. 341	11, 78, 79

S.

Scott, Ex parte	9 B. & C. 446	65
Smith, Re	3 H. & N. 227	65
—— *v.* Edge	2 H. & C. 659	250
—— *v.* Howell	6 Ex. 730	130
Souch *v.* Strawbridge	2 C. B. 808	83, 86
Staples *v.* Young	2 Ex. D. 324	294, 300
Stewart *v.* Green	5 Ir. Eq. 470	56
Stocken *v.* Collin	7 M. & W. 515	220, 221
Stuart's Trusts, In re	4 Ch. D. 213	138
Sweet *v.* Lee	3 Man. & G. 452	83, 85

T.

Tapscott *v.* Balfour	Law Rep. 8 C. P. 46	159, 267, 269
Taylor *v.* Jones	1 C. P. D. 87.	218
—— *v.* Merchants' Fire Insurance Company	9 Howard, S. Ct. Rep. 390	224
Tenant *v.* Goldwin	1 Salk. 361	11
Thiis *v.* Byers	1 Q. B. D. 244	267
Thomas *v.* Griffith	2 Giff. 504	259
—— *v.* Reg.	Law Rep. 10 Q. B. 44	253, 254, 255, 256
—— *v.* Shakespear	1 D. F. & J. 399; 29 L. J. (Ch.) 276	58
Thomson *v.* Davenport	7th ed. p. 386	105
Thompson *v.* Finden	4 C. & P. 158	20
—— *v.* Lapworth	Law Rep. 3 C. P. 149	312
Tidswell *v.* Whitworth	Law Rep. 2 C. P. 326	311, 312, 314
Tivnan, In re	5 B. & S. 645	65
Tobin *v.* Reg.	14 C. B. (N.S.) 505	254
Townsend's Case	Law Rep. 13 Eq. 148	218
Tubervil *v.* Stamp	1 Salk. 13	11
Tulk *v.* Moxhay	2 Phil. 774	41, 46
Turner *v.* Berry	5 Ex. 858	296

W.

		PAGE
Wakefield *v.* Brown	Law Rep. 9 C. P. 410	2
Walesby *v.* Goulston	Law Rep. 1 C. P. 567	286, 290, 299
Walls' Case	Law Rep. 15 Eq. 18	218
Warre *v.* Calvert	7 A. & E. 143	130
Warwick *v.* Richardson	10 M. & W. 284	130
Wells *v.* Horton	4 Bing. 40	83
Western *v.* MacDermott	Law Rep. 2 Ch. 72	48
Whitwell *v.* Perrin	4 C. B. (N.S.) 412	20
Wilson *v.* Newbury	Law Rep. 7 Q. B. 33	12
Winch *v.* Conservators of the Thames	Law Rep. 9 C. P. 378	124
Wingfield, Ex parte. Florence, In re	10 Ch. D. 591	281
Woodhams *v.* Newman	7 C. B. 654	296
Wooldridge *v.* Norris	Law Rep. 6 Eq. 410	130
Woolfe *v.* Horne	2 Q. B. D. 355	91

Y.

Yetts *v.* Foster	3 C. P. D. 437	34, 36
York and North Midland Railway Company *v.* Reg.	1 E. & B. 858	120

CASES

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION

XLII VICTORIA.

WELLS *v.* THE MITCHAM AND WIMBLEDON DISTRICT GAS LIGHT COMPANY AND ANOTHER. 1878 *Nov.* 4.

Costs — Reference — Shorthand Writers' Notes — Brief Copies for Counsel — Taxation — Rules of the Supreme Court (Costs).

Where an action is referred, the cost of brief copies of the transcript of shorthand writers' notes of each day's proceedings in the reference, made for the use of counsel, will not, in the absence of any order and of agreement between the parties, be allowed on taxation.

Croomes v. *Gore* (1 H. & N. 14) followed.

THIS was a motion to set aside an order of a judge at chambers, refusing to order the master to review his taxation.

The action was brought on a building contract, and with all matters in difference was referred to an arbitrator.

At the first meeting it was proposed by the plaintiff's solicitor to the defendants' solicitor that a shorthand writer's note should be taken on behalf of both parties. This was not agreed to, but a shorthand writer was employed by the plaintiff, and brief copies of the notes were furnished to the plaintiff's counsel. The plaintiff attended the reference with one counsel only.

By the award the plaintiff became entitled to his costs of the reference against the defendants. On taxation the plaintiff

1878

WELLS v. MITCHAM GAS LIGHT CO.

claimed, among other things, the costs of employing the shorthand writer, the cost of transcript of the notes, and the cost of brief copies of same for the use of counsel. The master disallowed the two former items, but allowed the latter, and on objection being made, under Rule 30 of the Rules of the Supreme Court (Costs), to the allowance of this last item, gave the following grounds of his decision:—

"In consequence of these objections I have reconsidered my allowance of the items objected to, but still consider they were rightfully allowed. Though the notes were used by the arbitrator, all that I have allowed is a copy of the evidence for counsel as the case progressed.

"It is true that solicitors' notes might have been shorter, but the defendants might well have objected to such notes being referred to, and the employment of a shorthand writer probably prevented the reference being prolonged to other meetings, or a second counsel might have been instructed to take a note of the evidence; but it appears to me that the expense would not have been less."

The learned judge at chambers declined to make an order to review the taxation, and the defendant appealed by way of motion to this Court.

J. Brown, Q.C., for the defendants. The usual practice is for the party desiring to have a shorthand writer's note to ask the other side to join in the expense. In the absence of any agreement these costs cannot be taxed against the defendants: *Croomes* v. *Gore* (1); *Kirkwood* v. *Webster*. (2)

Gates, Q.C., and *A. Cock*, for the plaintiff. This is a matter coming within the discretion of the master under Rule 29 of the Rules of the Supreme Court (costs), and the Court will not interfere: *Wakefield* v. *Brown*. (3) In effect these costs are really costs of additional instructions to counsel, and further, employing a shorthand writer has shortened the proceedings, and prevented the necessity for a second counsel to take notes.

J. Brown, Q.C., was not called on to reply.

(1) 1 H. & N. 14; 25 L. J. (Ex.) 267. (2) 9 Ch. D. 239.
(3) Law Rep. 9 C. P. 410.

1878

WELLS v. MITCHAM GAS LIGHT CO.

PER CURIAM (Kelly, C.B., and Cleasby, B.). The master must review his taxation. In the absence of any agreement between the parties, or an order of a judge or the Court, the rule laid down in *Croomes* v. *Gore* (1) should be adhered to. The fact that the defendants might have had to pay an equivalent sum in the absence of these notes, in respect of costs otherwise incurred, ought not to be taken into account in determining their liability to these costs.

Order to set aside order of judge, and for master to review his taxation.

Solicitors for plaintiff: *Wilkins, Blyth, & Fanshawe.*
Solicitor for defendants: *J. J. Keily.*

HANCOCK *v.* GUERIN AND OTHERS. *Nov.* 5.

Practice—Discovery after Claim and before Defence—Rules: Order XXXI., Rule 12.

A plaintiff after delivering a statement of claim is not, as a general rule, entitled, under Order XXXI., Rule 12, of the Rules of the Supreme Court, to an order for discovery of documents before a statement of defence is delivered, because, until that happens, it is impossible to say what the matters "in question in the action" are.

THE statement of claim, delivered on the 24th of October, 1878, claimed 185*l.* for commission on sales of liquors effected by the plaintiff for the defendants as their agent. Before any defence was delivered, the plaintiff took out a summons for discovery of documents, which, on the 29th of October, was dismissed by Field, J. No affidavit was filed by either party upon this summons; but at the hearing before Field, J., an affidavit was referred to, which had been filed by the defendants in opposition to an unsuccessful application made in September by the plaintiff for leave to sign final judgment under Order XIV. This affidavit alleged that the defendants owed nothing to the plaintiff; that the greater part of this claim was for commission on the sale of certain brandy; that this sale was effected, not by the plaintiff,

(1) 1 H. & N. 14.

1878

HANCOCK v. GUERIN.

but by another agent of the defendants; that the order for the brandy was confirmed by a letter of the 23rd of February, 1877, addressed by the purchaser to the defendants personally; and that the plaintiff was entitled to no commission. The plaintiff moved to rescind the order of Field, J., dismissing the summons.

C. C. Scott, for the plaintiff. The plaintiff is entitled to discovery of documents as a matter of right and without filing any affidavit, under the Judicature Act, 1873, Order XXXI., Rule 12. (1) Field, J., refused the application, on the ground that no statement of defence had yet been delivered. In *Mercier* v. *Cotton* (2), an action for libel, it was held that interrogatories delivered under Order XXXI., Rule 1, before the defence was delivered were properly struck out under Rule 5, on the ground that it was probable the defendant would admit the publication of the libel and all the facts, and render the interrogatories unnecessary. But here the defendants' affidavit, filed for another purpose, shews that they intend to dispute the whole claim and sets up a document in answer. That document the plaintiff desires to see, in order to discover if it be genuine. In *Cashin* v. *Craddock* (3), Bacon, V.C., held that a plaintiff would not in general be allowed *production* of documents until he has delivered a statement of claim, to which the defendant may demur if he thinks fit, implying that he would be so entitled when he has delivered it. Discovery necessarily precedes production; therefore, à fortiori, a plaintiff is entitled to discovery when he has delivered a statement of claim. The practice upon such applications is to adjourn it till a statement of defence is delivered, and if the Court does not grant the application, that is the proper course.

Kemp, Q.C., for the defendant, was not heard.

KELLY, C.B. This appeal must be dismissed. Order XXXI., Rule 12, enables a party to apply to a judge for an order for discovery of the documents "relating to any matter in question in

(1) By this rule "any party may without filing any affidavit apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action."

(2) 1 Q. B. D. 442.

(3) 2 Ch. D. 140.

1878

HANCOCK v. GUERIN.

the action." How can the judge know what the matters in question are, unless under some very special circumstances, until the statement of defence is delivered? And unless the matters in question are known, how can it be known whether documents, which may or may not bear upon them, relate to the matters in question? I think, therefore, that in the present case the plaintiff is not entitled to the order.

CLEASBY, B. The foundation of this application was that something had taken place, on the proceedings for leave to sign judgment under Order XIV., which would give a clear idea of what the matters in dispute were. That is not sufficient without a special affidavit, shewing that it was for some reason important to have at once an affidavit by the defendants of what documents are in their possession or power relating to any matter in question in the action. Order XXXI., Rule 12, says the application may be made "without filing any affidavit," but if it is made without an affidavit, it must comply strictly with the terms of the rule, and shew what the matters in question are.

Appeal dismissed with costs.

Solicitor for plaintiff: *G. Johnson.*

Solicitors for defendants: *Crook & Smith.*

CROWHURST *v.* THE BURIAL BOARD OF THE PARISH OF AMERSHAM.

Nov. 8.

Nuisance—Injury to Cattle—Projection of Poisonous Trees over Neighbour's Land—Maxim, "Sic utere tuo ut alienum non lædas."

The defendants, a burial board, planted on their own land and about four feet distant from their boundary railings a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow, which was hired by the plaintiff for pasture. The plaintiff's horse, feeding in the meadow, ate of that portion of the yew tree which projected over the meadow, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants. The plaintiff having brought an action for the value of the horse:—

Held, that the defendants were liable on the principle of the maxim, "Sic utere tuo ut alienum non lædas."

CASE stated by the judge of the county court of Bucks.

This is an action to recover 30*l.* damages for the loss of a horse.

1878

CROWHURST v. AMERSHAM BURIAL BOARD.

1. The defendants are owners and occupiers of about half an acre of land at Amersham, Bucks, which has been used for a cemetery for about seventeen years. It was constructed and used by the defendants, being a burial board, as a place of interment under the statutes applicable in that behalf.

2. The plaintiff has been tenant for the last two years, and some time previously for a period of three years, of a meadow adjoining the cemetery, and has used the meadow for pasture for his horses, and frequently visited the same.

3. The defendant's cemetery is separated from the plaintiff's meadow by a wall about two feet high, and at two places by an open iron railing about two feet high upon the wall. The wall and railing were constructed by and belong to the defendants, and when the cemetery was laid out about seventeen years ago, the defendants planted two yew trees about four feet within their fence, but which had grown through and beyond the iron railings so forming the defendant's boundary, and projected on or over the meadow in the plaintiff's occupation.

4. A horse belonging to the plaintiff had been turned out in the meadow for some months immediately preceding the 26th of September, 1877; and on that day the plaintiff saw the horse alive and well in the meadow.

5. On the morning of the 27th of September the horse (which was worth 21*l.*) was found dead in the meadow, having been poisoned by eating the twigs of branches and leaves of one of the yew trees.

6. On the 27th of September it was found that the horse must have and had browsed on and eaten a quantity of twigs, branches, and leaves of one of the yew trees, the same extending through the rails into the meadow, and also a quantity of twigs, branches, and leaves of the same tree within the defendant's fence, and within such a distance that a horse could browse when standing in the plaintiff's meadow and reaching his neck and head over the wall and rails. The wall and rails were not at that spot sufficiently high to prevent a horse from so browsing. The other yew tree did not appear to have been interfered with.

7. It was contended by the plaintiff, that the defendants were liable for the consequences of their having allowed the branches

of poisonous trees like the yew to project on to the plaintiff's meadow, and also for the fence not being sufficient to keep cattle from eating the yew.

8. The plaintiff was not aware of the existence of yew trees.

9. That cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is a fact generally known.

10. It was contended by the defendants, first, that the plaintiff proved no obligation on the defendants, by grant, prescription, or otherwise, to maintain any fence whatever for the plaintiff's benefit, and that the defendants were not liable for the consequences of the plaintiff's horse eating the defendants' tree; secondly, that if there was any breach of duty on the defendants' part, the accident to the horse was directly attributable to the plaintiff's act in turning him into a meadow where he could get at the tree, and that either the damage was too remote, or the plaintiff directly contributed to it by negligence on his part and by his own act.

The judge (who tried the case without a jury) found that in fact there had been no contributory negligence on the part of the plaintiff, and that, under the circumstances above stated, the defendants were liable, and gave judgment for the plaintiff for 21*l.* and costs.

The question for the opinion of the Court was whether the defendants were liable. The judgment to be entered as regards the action and costs, and the costs of this appeal, as the Court may direct.

The case having, on the 6th of May, 1878, come on for argument, it was pointed out that it did not appear whether the horse died from eating of that part of the tree which projected over and into the plaintiff's meadow, or of that part which was strictly within the defendants' cemetery (the horse being able to reach the latter with ease), or whether he died of the combined effect of eating both parts. The case having been sent back for the county court judge to state the cause of the horse's death with reference to this point, he stated that although the horse might have, and probably had, eaten twigs, leaves, and portions of branches of the tree strictly within the defendants' cemetery, or (as the judge expressed it) "within the space formed by a perpen-

1878

CROWHURST v. AMERSHAM BURIAL BOARD.

dicular line drawn to or from the outmost edge or limit within the defendants' land and premises," yet he found as a fact that the twigs, leaves, and branches which projected beyond "the space formed," &c., over and into the plaintiff's meadow were of themselves alone amply sufficient to have caused the horse's death; and that, upon this finding, he gave judgment for the plaintiff.

June 25. *J. O. Griffits, Q.C.* (*Cooper Wyld*, with him), for the plaintiff.

G. Shaw (*Herschell, Q.C.*, with him), for the defendants.

The arguments sufficiently appear in the judgment. Besides the authorities there cited, *Pickering* v. *Rudd* (1) was referred to.

Cur. adv. vult.

Nov. 8. The judgment of the Court (Kelly, C.B., and Pollock, B.) was delivered by

KELLY, C.B. This is an appeal from the county court of Buckinghamshire, held at Chesham. The judgment in the Court below was for the plaintiff, damages 21*l.*, and the judge stated a case for our opinion. The material facts of this case are as follows. The defendants some seventeen years ago obtained a piece of land for the purposes of their cemetery, and fenced it round with a dwarf wall in which at two places there were openings filled up with iron railings about two feet high. Where these railings occurred the defendants planted two yew trees, about four feet distant from the railing. These grew through and beyond the railings, so as to project over an adjoining meadow. The plaintiff, two years before the alleged cause of action, hired the meadow to pasture his horses for a term of three years. After he had occupied it for two years, his horse, which was feeding in the meadow, ate of that portion of one of the yew trees which projected over the meadow —the wall and rails not being sufficiently high to prevent a horse from so eating—and died from the effects of the poison contained in what he ate. The question for our determination is, whether the death of the horse, so occasioned, afforded any cause of action against the defendants. There being no pleadings in the county court, the question is not in any way affected by the form in which

(1) 1 Stark. 56.

the cause of action is put forward, and the facts, as found by the judge of the county court, must be taken as conclusive. The only matter, therefore, for our decision is whether, upon those facts, any legal liability is disclosed. The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and therefore is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is therefore necessary to determine what are the principles of law properly applicable to it.

Before doing this, it may be well to state shortly what we apprehend to be the effect of the finding of the county court judge. In the first place, we consider that the judge has so found the facts, as to the planting and growth of the yew trees, as to preclude the supposition of mere accident: and that the trees must be taken so to have been planted and grown, with the knowledge of the defendants, as to make them responsible for whatever might be the direct consequence of the original planting. Secondly, although it is found that the plaintiff saw the horse in the meadow the day before it died, it is also found that he was not aware of the existence of the yew trees, and we think it must be taken that any such negligence on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing, and we do not think that he was bound to examine all the boundaries so as to see that no tree likely to be injurious to his horse was projecting over the field he had hired.

It ought also to be noticed that the decision in no way depends upon any question of fencing, or the correlative rights and duties arising therefrom, and therefore the cases which were cited to us based upon these afford no assistance.

The question seems to resolve itself into this: Was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupier of the adjoining field, which, when damage arose from it, would give the latter a cause of action?

On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in

1878

CROWHURST v. AMERSHAM BURIAL BOARD.

its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject-matter of an action, especially when an adjoining landowner over whose property it grew would, according to the authorities, have the remedy in his own hands by clipping.

On the other hand, the plaintiff may fairly urge that what was done was a curtailment of his rights which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question. And although the right so to trim may be conceded, this does not dispose of the case, as the watching to see when trimming would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbour by the acts of an adjoining owner. It may also be said that if the trees were innocuous, it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, from similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land.

The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher* v. *Rylands* (1), where it is said, "We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril; and if he does not do so is primâ facie answerable for all the damage which is the natural consequence of its escape." This statement of the law was cited and approved of in the judgment of the House of Lords in the same case (2). In *Fletcher* v. *Rylands* (1) the act of the defendant complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but though the degree of caution required may vary in each particular case the principle upon which the duty

(1) Law Rep. 1 Ex. at p. 279. (2) Law Rep. 3 H. L. at p. 339.

depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind: as in *Aldred's Case* (1), where the wrong complained of was the building of a house for hogs so near to the plaintiff's premises as to be a nuisance; the user of a lime-kiln and lime-pit for tanning or a dye-house (2); the laying of dung so high as to damage a neighbour, *Tenant* v. *Goldwin* (3): and others which are cited in Comyns' Digest "action on the case for a nuisance," and in the judgment in *Fletcher* v. *Rylands* (4); in all which cases the maxim "Sic utere tuo ut alienum non lædas" was considered to apply; and those who so interfere with the enjoyment by their neighbours of their premises were held liable.

Other cases of a similar kind may be found in the books. Thus, in *Tubervil* v. *Stamp* (5), it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbour's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert* v. *Bessey* (6) the action was in Trespass qu. cl. fregit. The defendant pleaded that he had land adjoining the plaintiff's close and upon it a hedge of thorns; that he cut the thorns, and that they ipso invito fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer judgment was given for the plaintiff on the ground that though a man do a lawful thing, yet if any damage thereby befalls another he shall be answerable if he could have avoided it. This case was alluded to and approved of by Lord Cranworth in his judgment in the House of Lords in *Rylands* v. *Fletcher* (7), where he says, "The doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." It does not appear from the case what evidence was given in the county court to prove, either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge it would be

(1) 9 Rep. 57 b.
(2) 2 Roll. 141.
(3) 1 Salk. 361.
(4) Law Rep. 1 Ex. at p. 279.
(5) 1 Salk. 13.
(6) Sir T. Raym. 421.
(7) 3 H. L. at p. 341.

1878

CROWHURST v. AMERSHAM BURIAL BOARD.

immaterial, as whether they knew it or not they must be held responsible for the natural consequences of their own act. It is, however, distinctly found by the judge "that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby is a fact generally known;" and by this finding, which certainly is in accordance with experience, we are bound. Several cases were cited during the argument. In two of these, *Lawrence* v. *Jenkins* (1) and *Firth* v. *Bowling Iron Co.* (2), the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson* v. *Newbury* (3), which arose upon demurrer to a declaration, the Court merely decided that an averment that clippings from the defendant's yew trees got upon the plaintiff's land was insufficient, without shewing that they were placed there by or with the knowledge of the defendant. Mr. Justice Mellor, however, in giving judgment says, after alluding to *Fletcher* v. *Rylands* (4), "If a person brings on to his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on his neighbour's land."

Another case which was cited during the argument was that of *Erskine* v. *Adeane* (5), in which the Court of Appeal held that a warranty could not be implied by the lessor of land, let for agricultural purposes, that there were no plants likely to be injurious to cattle, such as yew trees, growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. We notice it, therefore, only that we may not appear to have overlooked it.

In the result we think that the judgment of the county court was correct, and that it should be affirmed with costs.

Judgment for the plaintiff affirmed.

Solicitor for plaintiff: *Cox, for D. Clarke, High Wycombe.*

Solicitors for defendants: *Allen & Edwards, for Bedford, Amersham.*

(1) Law Rep. 8 Q. B. 274.
(2) 3 C. P. D. 254.
(3) Law Rep. 7 Q. B. at p. 33.
(4) Law Rep. 1 Ex. at p. 279.
(5) Law Rep. 8 Ch. 756.

WHITEHEAD, APPELLANT; HOLDSWORTH AND ANOTHER, RESPONDENTS. 1878

Coal Mine — Check-weigher — Removal — Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 18. *Nov.* 8.

The appellant, who was a miner in the respondents' coal mine, was appointed check-weigher by the other miners under the provisions of s. 18 of the Coal Mines Regulation Act, 1872, and acted in that capacity, and was paid by the miners. Subsequently the respondents dismissed all the miners and closed the mine. No notice was given to the appellant by the respondents, or by or on behalf of the miners. On the mine being reopened a short time afterwards, the appellant claimed to be still check-weigher and to be entitled to perform the duties of that office, and brought an action against the respondents for preventing his doing so:—

Held, that the appellant had, on the dismissal of the miners, ceased to be check-weigher, and that the action could not be maintained.

IN an action in a county court to recover damages sustained by the plaintiff, by reason of the defendants preventing him from acting in his capacity as check-weigher on the part of the miners employed in the Beckett Street Colliery, belonging to the defendants, the judge gave judgment for the defendants, subject to the following case:—

1. The defendants are the owners of a coal mine called the Beckett Street Colliery.

2. On the 4th of March, 1875, the plaintiff, who was at that time a miner employed in the colliery, was, under section 18 of the Coal Mines Regulation Act, 1872 (1), duly appointed by the

(1) 35 & 36 Vict. c. 76, s. 18, enacts: "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as a check-weigher) at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. The check-weigher shall be one of the persons employed either in the mine at which he is so stationed or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the check-weigher as required by this section, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by enforcing to the best of his power the provisions of this section to prevent such contravention or non-compliance.

"The check-weigher shall not be

1878

WHITEHEAD v. HOLDSWORTH.

miners employed in the colliery to act as check-weigher on their behalf.

3. From the 4th of March, 1875, down to the 17th of May, 1877, the plaintiff acted as such check-weigher, receiving a weekly wage of 31*s.* paid to him by an association to which all the miners belonged, on behalf of the miners employed in the colliery.

4. On the 10th of May, 1877, the defendants gave notice to each of the miners in the colliery determining their service at the expiration of seven days from that date.

5. After the expiration of the notice, and after the miners had delivered up their tools to the defendants, viz. on the 18th of May, 1877, and again on the 19th the defendants re-engaged all the old hands except six, and one or two fresh ones in addition, upon the same terms, and accordingly the miners so re-engaged, and the fresh hands, commenced to work for the defendants. No notice of any kind was given to the plaintiff by the defendants, or by or on behalf of the miners.

6. Upon the 19th of May, 1877, the defendants prevented the plaintiff from acting as check-weigher on behalf of the miners,

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authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, but shall be authorized only to take such account as aforesaid, and the absence of the check-weigher shall not be a reason for interrupting or delaying such weighing.

"If the owner, agent, or manager of the mine desires the removal of a check-weigher on the ground that such check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself, he may complain to any court of summary jurisdiction, who, if of opinion that the owner, agent, or manager, shews sufficient primâ facie ground for the removal of such check-weigher, shall call upon the check-weigher to shew cause against his removal. On the hearing of the case, the Court shall hear the parties; and if they think that at the hearing sufficient ground is shewn by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed, but without prejudice to the stationing of another check-weigher in his place. The Court may in every case make such order as to the costs of the proceedings as they think fit.

"If in pursuance of any order of exemption made by a Secretary of State, the persons employed in a mine to which this Act applies are paid by the measure or gauge of the material gotten by them, the provisions of this section shall apply in like manner as if the term 'weighing' included measuring and gauging, and the terms relating to weighing shall be construed accordingly."

and from having access to the colliery and the premises attached thereto, and from having any facility or opportunity for taking an account of the coal gotten by the miners employed at the colliery, and thereby prevented the plaintiff from receiving his wages.

7. The judge of the county court ruled that, on the facts above stated, the plaintiff had by virtue of the notice of the 10th of May, 1877, ceased to be duly appointed check-weigher on behalf of the miners, and not being on the 19th of May, 1877, in the employ of the defendants, the plaintiff could not be appointed and was not such check-weigher, and had no right of access to the colliery or the premises attached thereto.

The question for the opinion of the Court was, whether, upon the facts above stated, the plaintiff was on the 19th of May, 1877, duly appointed check-weigher on behalf of the miners.

Sanderson Tennant (*G. Hardy*, with him), for the appellant. The statute points out the manner in which a check-weigher can be dismissed by the mine-owner; the appellant has not been dismissed in that way nor by his employers, and consequently when the mine was reopened he had a right to resume his employment. If it were not so, the masters would have an easy way of evading the Act and getting rid of a check-weigher by closing the mine; then when the miners are re-engaged, the check-weigher, not being a servant to the mine-owner, could not be reappointed by the men.

Lofthouse, for the respondents, was not called on.

KELLY, C.B. With some regret I have come to the conclusion that the county court judge was right, and that the appellant ceased to be check-weigher as soon as the body of persons who employed him were dismissed, and whether a day or six months intervened between the extinction of the old body of workers in the mine and the creation of a new body, does not in my judgment affect the matter. The new body may appoint a check-weigher, but if they do not, the appellant would not by reason thereof remain in an office which had in fact ceased to exist while the mine was closed. I quite see that this may put it in the power of a master to get rid of a check-weigher who is objectionable to

1878

WHITEHEAD v. HOLDSWORTH.

him, but on the other hand the owner may, if he pleases, shut up his mine for as long or short a time as he chooses; and it cannot be that when the mine is opened again under different circumstances, and perhaps with different workmen, the check-weigher can claim that his appointment has continued through the interval.

CLEASBY, B., concurred.

Appeal dismissed.

Solicitor for appellant: *J. W. Hickin, for W. J. Clegg & Sons, Sheffield.*

Solicitors for respondents: *Paterson, Snow, & Bloxam, for Dibb, Atkinson, & Braithwaite, Leeds.*

Nov. 14.

INSLEY *v.* JONES.

Practice—Sending Case to County Court—Claim indorsed on Writ—Condition as to Costs of Trial—County Court Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 7.

A claim indorsed on a writ of "50*l.* and interest at the rate of 5*l.* per cent. per annum from the date hereof until payment or judgment," is a claim exceeding 50*l.* within the meaning of the County Court Act, 1867, s. 7, and the action cannot be sent to a county court under that section.

On an application at chambers, in such a case, to send the action to the county court, there is no power to impose a condition as to the costs of the trial in the superior Court.

APPEAL from an order of a judge at chambers.

The writ in the action was indorsed as follows: "The plaintiff's claim is for the return of the sum of 50*l.* paid by the plaintiff to the defendant under an alleged agreement dated the 26th day of April, 1878, and made between the defendant of the one part and the plaintiff of the other part. The plaintiff also claims interest on the above sum at the rate of 5*l.* per cent. per annum from the date hereof until payment or judgment, and the plaintiff also claims the same sum on accounts stated, and 2*l.* 17*s.* 6*d.* for costs; and if the amount claimed be paid to the plaintiff or his solicitors within four days from the service hereof, further proceedings will be stayed." (1)

(1) The latter part of the indorsement from the words "The plaintiff also claims interest," &c., were, with the exception of the amount of costs, printed.—See Order III., Rule 7.

1878

INSLEY v. JONES.

The defendant applied to a master for an order that the action should be tried in a county court under s. 7 of the County Court Act, 1867, which enacts that where in any action of contract brought or commenced in a superior court of common law "the claim indorsed on the writ does not exceed 50*l.*" a judge at chambers shall, unless there be good cause to the contrary, order such action to be tried in the county court or one of the county courts in which the action might have been commenced. The master refused the application, and the defendant appealed to Lindley, J., who dismissed the appeal, but added to his order, "but if only 50*l.* is recovered, the plaintiff to be only entitled to county court costs, unless the judge at the trial otherwise directs."

The plaintiff appealed to the Court by way of motion against so much of this order as imposed the condition as to costs.

Bigham, for the plaintiff. The order of the master was right, and the appeal against it ought to have been dismissed, without the imposition of the term as to costs which there is no authority to make. Interest can only be recovered if demanded in writing, 3 & 4 Wm. 4, c. 42, s. 28, but the demand on the writ is sufficient: *Pierce* v. *Fothergill.* (1) There is, therefore, a claim indorsed on this writ for more than 50*l.*, and the case cannot be sent to the county court.

C. H. Anderson, for the defendant. The claim mentioned in s. 7 as indorsed on the writ is for that which is due at that date. This claim for interest was not due then, and it may or may not be given by the jury. It ought not therefore to stand in the way of the defendant's right to have the case heard in a county court.

Bigham, in reply. The contention on behalf of the defendant confuses two things, "cause of action," and "claim indorsed on the writ." [He cited *Rodway* v. *Lucas.* (2)]

PER CURIAM (Kelly, C.B., and Cleasby, B.) The claim indorsed on the writ exceeds 50*l.*, and consequently the action cannot be sent to the county court under s. 7 of the County Court Act, 1867. The order of the learned judge will be set aside, so far as

(1) 1 Hodges, 251. (2) 10 Ex. 667; 24 L. J. Ex. 155.

1878

INSLEY v. JONES.

the condition goes which there was no power to impose, and the order made by the master must stand.

Appeal allowed.

Solicitors for plaintiff: *Goldring & Jukes, for E. & A. Caddick, West Bromwich.*

Solicitor for defendant: *G. S. Warmington.*

Nov. 15.

THOMAS AND ANOTHER *v.* LEWIS.

Ship and Shipping—Ship's Husband, Authority of, to bind Owner by cancelling Charterparty.

A ship's husband, who has the authority of the owners of the ship to enter into a charterparty, and has accordingly made a charterparty by which commission on the freight, primage, and demurrage is stipulated to be due to the charterers on the execution of the charterparty, has not, without the express sanction of the owners, power to bind them by an agreement to cancel the charterparty and pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners.

CASE stated by the judge of the county court of Monmouthshire, held at Newport.

The action was for 24*l.* The defendant was part-owner of a vessel of which Rees had been, in writing, appointed ship's husband by the defendant and three other part-owners of the ship. Rees, as such ship's husband, entered into a charterparty with the plaintiffs, dated the 9th of February, 1876, the vessel being then at Amsterdam, whereby it was stipulated that the vessel should with all convenient speed proceed in ballast to Scarborough, Tobago, for orders, load a full and complete cargo of sugar $\frac{\text{and}}{\text{or}}$ other lawful produce, timber and cotton excepted; the vessel to proceed to Queenstown, or any convenient port of call, for orders, to be given in reply to captain's telegram, to discharge at one safe port in the United Kingdom, and discharge in such dock as charterers appoint, and deliver the same on being paid freight at a certain rate. It was stipulated by the charterparty that should the vessel not arrive in Tobago by the 1st of April, charterers' agent to have the option of cancelling or confirming the charterparty, and that 5 per cent. commission on the amount of freight,

primage, and demurrage, was due on the execution and signment of the charterparty, and to be paid to the plaintiffs, ship lost or not lost.

The ship being at Amsterdam, Rees informed the plaintiffs that she could not get to Tobago in the time named in the charterparty, and that if she was not there in time she might not get a cargo; and in March, at the request of Rees, the plaintiffs agreed to and did cancel the charterparty, upon the express agreement of Rees to pay 24*l.*, being the sum which it was estimated the commission at 5 per cent. on the freight, together with the stamp on the charterparty, would amount to if the charter were carried out. This sum was to be paid forthwith in cash by Rees, as such ship's husband, but he neglected to do so; and on the 29th of July, 1876, he gave the plaintiff's agent a promissory note in his own name, payable one month after date, for 24*l.*, which was still unpaid. Evidence was given that the cancellation of the charterparty was for the benefit of the owners.

It was contended for the plaintiffs that they had done all on their part to be done to entitle them to be paid the commission, and that their right to recover the commission accrued immediately upon the execution and signment of the charterparty, and existed at the time of the cancellation, and did not depend upon the cancellation, and that the charterparty was only cancelled upon the express agreement of Rees to pay the commission. That it was within the scope of the authority of Rees, as ship's husband to cancel the charterparty, and to agree upon the terms of such cancellation, more particularly as it was for the benefit of the vessel.

Each of the above points was contested on behalf of the defendant, and it was also contended that the plaintiffs, in subsequently accepting Rees' promissory note, adopted him as the person liable to them, and therefore discharged the owners of the vessel, and that the transaction was a personal one between the plaintiffs and Rees; that Rees absconded in November, 1876, and although the promissory note became due prior to that date no claim was made against the owners of the ship until after Rees had absconded.

The judge held that though Rees had, as ship's husband, authority to charter the vessel, he was not empowered to pledge his

1878

THOMAS v. LEWIS.

owners' credit for the payment of a sum of money for the cancellation of the charterparty without their express sanction, that being a matter quite unusual, and out of the ordinary course, however advantageous the compromise effected might have been to the interest of all the owners; and as no special authority was proved to have been given, he nonsuited the plaintiffs.

The question for the Court was whether, under the circumstances, the plaintiffs were entitled to recover the 24*l.*

Anstie, for the plaintiffs. The question is whether a ship's husband, who has authority to bind the owners by effecting a charterparty, has authority to bind them by cancelling it and paying a sum in lieu of commission, where the arrangement is beneficial to the owners. There is no direct authority on the subject, but such decisions as exist are in principle in favour of the plaintiff's contention. The nearest is *Barker* v. *Highley* (1), where it was held that a ship's husband and managing owner has authority to bind his co-owner by giving a bail bond to release the ship from arrest in a suit for collision.

[CLEASBY, B. There the ship's husband was managing owner.]

But the judgment is not based on that. A part-owner of a ship is not the partner of his co-owners. A ship's husband and managing owner has authority to bind his co-owners by an order for necessaries: *Whitwell* v. *Perrin* (2). Also for work done to the ship, unless it be shewn that the dealing was that the ship's husband should be looked to exclusively: *Thompson* v. *Finden* (3); and the same principle underlies *Robinson* v. *Read* (4). If the plaintiffs were to treat this charterparty as still subsisting and sue the defendant on it, he could plead and prove rescission, and the plaintiffs would have no answer. The defendant has had all the advantage of the cancelling, and now seeks to avoid the burden. The ship being at Amsterdam, it may well be that the owners could not be communicated with in time to obtain their assent, as it does not appear where they were. There might be sixty-four, or any number of owners, and unless a ship's husband has the

(1) 15 C. B (N.S.) 37; 32 L. J. (C.P.) 270.
(2) 4 C. B. (N.S.) 412.
(3) 4 C. & P. 158.
(4) 9 B. & C. 449.

authority to bind them, they may be involved in heavy loss before it is possible to consult them all. There can be no difference in principle between authority to make a contract and to put an end to it—the authority being given in each case for the convenience and benefit of the principal. It cannot be, as suggested by the defendant, that Rees was professing to bind himself alone, for since he was not part owner he would lose nothing by allowing the charterparty to continue on which he was not liable. No reason can be given why he should make himself personally liable. Unless the question of authority is the question for the Court, there was no need to state a case.

A. T. Lawrence, for the defendant. It is admitted that no authority exists in favour of the proposition that the ship's husband has authority, merely as such, to bind the owners by cancelling the contract. The nearest decision in point is *Campbell* v. *Stein* (1), where Lord Eldon held that he has no authority to pledge the owner to the expenses of a law suit. This case is cited with others in Abbott on Shipping, 11th ed. pp. 79, 80. In Story on Agency, § 35, it is said: "A ship's husband is sometimes appointed merely for the purpose of conducting the ordinary and necessary concerns of the ship on her return to her proper home port; such as making the proper entries at the custom house; superintending the landing of the cargo; procuring the proper surveys of damage; settling the freight; and other incidents connected with the discharge of the cargo, and the termination of the voyage. But generally the person designated as ship's husband has a much larger authority, and is understood to be the general agent of the owners in regard to all the affairs of the ship in the home port. As such general agent he is intrusted with authority to direct all proper repairs and equipments and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper to despatch her for and on her intended voyage. But his authority does not extend to the procuring of any policy of insurance on the ship, either in port or for the voyage, without some express or implied assent of the owner." It is usual to make charterparties,

(1) 6 Dow. at p. 135.

1878.

THOMAS v. LEWIS.

but not to cancel them: the judge has found expressly that it is out of the usual course of business. The owner of a ship, after hearing that the ship's husband has made a charterparty, may well suppose that the charterparty will continue unless his consent is obtained to its termination, and that he will not be called upon for a sum of money without notice. The terms of the case, moreover, seem to imply that Rees did not profess to bind any one but himself.

KELLY, C.B. In one sense, the point we have to determine is entirely new, and I should feel much hesitation in holding, for the first time, that a ship's husband has the authority which has been contended for, there being no decision or dictum of any judge, and no authority, to that effect. A ship's husband has the authority of the ship's owners to procure a charterparty, and to make contracts for their benefit, but there his authority ceases; and though it might be very desirable and expedient where the ship's husband is on the spot and the owners are in a foreign country, and cannot be communicated with without loss of time, that the ship's husband should have power to cancel the charterparty on the best terms he can obtain, and it is perhaps to be regretted that he has not such a power, I cannot take upon myself to say, for the first time, that such a power exists, in the absence of any authority to that effect. I think the judgment must be affirmed.

CLEASBY, B. I am of the same opinion. I think a ship's husband has no authority to pay a particular sum for the cancellation of the charterparty, and I doubt if he has authority to cancel it at all. Rees was appointed ship's husband before the charterparty was made, and we may take it, therefore, that he had authority to enter into the charterparty. We have been referred to a passage in Bell's Commentaries, cited in Story on Agency (§ 35, n. 4), as to the general duties of a ship's husband, and they do not, as there stated, include any authority to put an end to the contract of charterparty. Bell says: "His powers, where not expressly limited, may be described generally as those requisite to the performance of the duties now enumerated. It may be observed, however—1. That without special powers he cannot

borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them which will form debts against the concern, whether he has funds in his hands or not with which he might have paid them. 2. That although he may, in the general case, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight and give up the possession and lien over the cargo, unless it has been so settled by charterparty, or unless he has special authority to give such indulgence. 3. That under general authority as ship's husband, he has no power to insure or to bind the owners for premiums, this requiring a special authority." (1) According to this authority, he seems to have power to act under the usual conditions: he can do whatever is necessary for *using* the ship.

It is, moreover, not clear upon the case whether the agreement to cancel the charterparty was made between the plaintiff and Rees in his individual capacity, or between them and him as agent of the owners. Having regard to the exceptional character of the arrangement, I should be inclined to think that the transaction was made entirely on the personal credit of Rees, and I think the fair inference from the circumstances is that he had no authority to bind the owners.

Judgment for the defendant.

Solicitors for plaintiffs: *J. White & Sons, for J. D. Pain & Son, Newport.*

Solicitors for defendant: *E. Warriner, for Gibbs & Llewellyn, Newport.*

(1) 1 Bell. Com. on Law of Scotland, bk. 3, pt. 1, ch. 4, p. 553, 7th ed.

1878
Nov. 18.

BLACK AND OTHERS, CLAIMANTS; HOMERSHAM, DEFENDANT.

Shares—Sale of—Dividends declared between Contract for Sale and Completion.

Shares of a company were sold by auction on the 1st of August, and a deposit was paid. By the conditions of sale, the purchase was to be completed on the 29th of August, which accordingly was done and the transfers signed. The conditions of sale were silent as to dividends, and, in the meanwhile, on the 24th of August, a dividend was declared in respect of a period antecedent to the sale by auction:—

Held, that the dividend belonged to the purchaser.

SPECIAL CASE, from which the following facts are taken.

On the 30th of June, 1877, the defendant was the registered holder of 251 shares in the Mitcham and Wimbledon District Gas Light Company. Some of these shares were sold by public auction on the 1st of August, 1877, and the remainder were sold on subsequent days prior to the 21st of August, 1877. All the sales were made and completed in accordance with printed particulars and conditions of sale, the third of which was as follows: "Each purchaser shall immediately pay into the auctioneer's hands a deposit of 20*l.* per cent. in part of his or her purchase-money, and sign an agreement for payment of the remainder on the 29th of August, 1877, at the office of the vendor's solicitor, when and where the purchases are to be completed, and in this respect time shall be of the essence of the contract." Another of the conditions of sale was, "If either of the purchasers neglect or fail to complete his purchase on the 29th of August, 1877, the deposit money shall be absolutely forfeited to the vendor."

In pursuance of a notice dated the 8th of August, 1877, the ordinary half yearly general meeting of the shareholders of the company was held on the 28th of August, 1877, when a dividend for the half year which ended the 30th of June, 1877, was declared. The transfer books of the company were closed from the 13th to the 28th of August.

No mention of any dividend was made either in the printed particulars and conditions of sale, or by the auctioneer, or by any other person on the defendant's behalf at the sales.

The claimants were the several purchasers of some of the shares and paid the balance of the purchase-money on the 29th of August,

but in the case of one of the claimants a transfer was executed to him on the 24th August.

The question for the opinion of the Court was, whether under these circumstances the claimants or the defendant were entitled to the dividend on the shares declared on the 28th of August, 1877.

Gore, for the claimants, was stopped.

Webster, Q.C. (*Candy*, with him), for the defendant. Dividends are profits earned from time to time in respect of the share property. These profits were earned during the time the defendant was owner, and he is entitled to them. The conditions of sale fixed the day for completion, and before that time the dividend was declared and became a debt due to the defendant: *De Gendre* v. *Kent* (1). By analogy to real property, the ordinary profits of these shares until the completion of the sale belonged to the vendor: *Poole* v. *Shergold* (2); and there can be no such thing as relation back where the conditions of sale fix the time for completion.

Gore, was not called on to reply.

KELLY, C.B.—I am clearly of opinion that the completion of the purchase has relation back to the time when the contract was made, which vested from that moment the right to the shares in the purchasers. They purchased the shares on that day and at that time, and at their then value, and when they paid the remainder of the purchase-money at the time fixed for completion they had a complete title to the shares as they bought them on the 1st of August. It is a different case from that of real property, and the suggested analogy does not, in my opinion, hold.

CLEASBY, B. I am of the same opinion. I think it would be very strange if the matter were determined otherwise; for we know that the value of such property falls immediately a dividend is paid. The purchaser bought at the value before dividend, and if he does not receive it, he will be paying so much more for his shares than he bargained for.

Judgment for the claimants.

Solicitors for claimants: *J. A. Girling, and Henry Kimber & Co.*
Solicitor for defendant: *W. Sturt.*

(1) Law Rep. 4 Eq. 283. (2) 1 Cox, 273.

1878
Nov. 19.

JAKEMAN v. COOK.

Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 49—*Order of Discharge—Promise for valuable consideration to pay Debt released by discharge.*

Where a debtor, after having obtained an order of discharge under the Bankruptcy Act, 1869, promises, for a new and valuable consideration, to pay a debt which by virtue of s. 49 has been released by the discharge, an action lies against him for the amount of the debt.

Heather v. *Webb* (2 C. P. D. 1) distinguished.

CASE stated by the judge of the county court of Yorkshire, held at Sheffield.

The action was brought under s. 1 of the County Courts Act, 1875, to recover 16*l.* claimed by the particulars of demand as an "amount owing upon account rendered for meat sold and delivered."

On the 15th of November, 1873, there was due from the defendant to the plaintiff a sum of 14*l.* for meat sold and delivered. On that day the defendant instituted proceedings for liquidation by arrangement in the county court, and in December, 1873, the creditors passed a resolution that the affairs be liquidated by arrangement, and that the defendant's discharge be granted, which resolution was duly registered and certified by the registrar. Under the proceedings the plaintiff tendered a proof, which was admitted, for the above sum of 14*l.*, for meat sold and delivered, but no dividend was declared by the trustee, nor did the plaintiff receive any payment in respect thereof out of the defendant's estate.

Subsequently to his discharge, the defendant, about January or February, 1874, promised the plaintiff that if, notwithstanding the defendant's discharge and the plaintiff's proof, the plaintiff would continue to supply the defendant with meat on a running account as before, that is to say on credit when required, he, the defendant would pay to the plaintiff the whole of the 14*l.* The promise was by word of mouth only, and on the faith of it between February, 1874, and November, 1875, the plaintiff at intervals supplied the defendant with meat, as appeared by the particulars of demand, and the defendant paid the plaintiff

various sums on account from time to time till November, 1875, when there remained unpaid on a balance of account the sum of 16*l.*, the items being shewn on the particulars of demand.

The defendant paid 2*l.* into court, and contended that his discharge was a release of all liability for meat sold and delivered previous to the discharge. The judge gave judgment for the plaintiff for 14*l.*, being the sum claimed, less 2*l.* paid into court, on the ground that the old debt, though released by the discharge, had been revived by the subsequent promise, coupled with what the judge held to be a new consideration arising out of the fact that the plaintiff had, on the faith of the promise, supplied the defendant with other meat upon credit.

The question for the opinion of the Court was, whether upon the facts above stated the debt and liability of the defendant to the plaintiff, in respect of the meat sold and delivered previous to the discharge of the defendant, were in law revived, or, whether the discharge of the defendant under the liquidation proceedings was a good answer in law to the claim.

Bray, for the defendant. The question is, whether, when a debt has been released by an order of discharge in liquidation under the Bankruptcy Act of 1869, any action can be brought to recover the debt upon a promise to pay it made for good consideration. It cannot be denied that, independently of statute, such a promise could be sued on at common law, with or without a valuable consideration, the moral obligation to pay being a sufficient consideration to support the promise. But 6 Geo. 4, c. 16, s. 131, enacted that no bankrupt should be liable to pay any debt from which he had been discharged by his certificate, upon any contract, promise, or agreement, unless the contract, &c., were in writing and signed. The Act of 1849, 12 & 13 Vict. c. 106, s. 204, abolished the distinction between a verbal and a written promise, and enacted that no bankrupt should be liable upon any such promise; and the Act of 1861, 24 & 25 Vict. c. 134, s. 164, contained a similar enactment. All those Acts having been repealed, the question now turns on the Act of 1869, 32 & 33 Vict. c. 71, s. 49, by which "An order of discharge shall not release the bankrupt from any debt or liability incurred by

1878

JAKEMAN v. COOK.

means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts proveable under the bankruptcy" with certain exceptions . . . . "An order of discharge shall be sufficient evidence of the bankruptcy and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence." By s. 125, sub-s. 7, liquidation by arrangement has the same effect in this respect as bankruptcy. It was contended in *Heather* v. *Webb* (1) that, since s. 49 differs from the former Acts, an action may be maintained upon a promise to pay the old debt which had been discharged by the bankruptcy; but it was held that no such action could be maintained, and the Court cannot decide the present question in favour of the plaintiff without overruling that case. It must be conceded that the supply of new meat was a good consideration, but that addition makes no difference, as was held in *Evans* v. *Williams* (2) upon the Insolvent Debtor's Act, 7 Geo. 4, c. 57, s. 61. Even a bond (into the consideration for which it is unnecessary to look) given for a discharged debt cannot be sued on, as was held in *Kidson* v. *Turner* (3), upon s. 204 of the Act of 1849. The policy of the law being to prevent such actions, no consideration can avail to make a promise enforceable.

Woolf, for the plaintiff, was not heard.

KELLY, C.B. The provisions of the Bankruptcy Acts upon the question involved in this case being various, and differing in the different Acts, we must look closely at the words of the Act under which the question arises. One object of the Bankruptcy Acts was to enable a debtor who had given up all his property for the benefit of his creditors to obtain his discharge, so that he might begin the world again freed from all his obligations

(1) 2 C. P. D. 1. (2) 1 Cr. & M. 30.
(3) 3 H. & N. 581; 27 L. J. (Ex.) 492.

1878

JAKEMAN v. COOK.

and protected from oppression by his creditors. Another object was to prevent frauds by the debtor in giving an undue preference to one creditor, and promising to pay him after the discharge to the prejudice of the general body of the creditors. Now such of the former Acts as contain express provisions on the point substantially differ from the Act now in force. By the first of those Acts, 6 Geo. 4, c. 16, no bankrupt was liable upon a promise to pay a debt discharged by a certificate, unless the promise were in writing. So far, therefore, as that Act went there was nothing contrary to the general policy of the law in bringing such an action, for it could be brought if the promise were written. By the Acts of 1849 and 1861 it was provided that no action could be brought on such a promise, whether verbal or written. Those Acts, however, were repealed, and the Act of 1869, by a simple and salutary enactment, provides that a debtor who gives up all his property to his creditors and obtains their assent, whether the proceedings be in bankruptcy or in liquidation, may, under certain conditions, obtain an absolute discharge from his debts. But is there anything to prevent him from doing that which is in itself praiseworthy, and which every man ought to do if he can—entering into an entirely new contract for ample consideration to pay his old debts? I can see nothing contrary to the spirit of the bankruptcy laws in a debtor, who has given up all his property and obtained his discharge, honestly making a new engagement to do justice to his creditors if he receives an adequate benefit. A man who is just recovering from liquidation proceedings may have great difficulty in knowing what to do to obtain support for himself and his family. It is of the greatest consequence to him to get the ordinary necessaries of life, but he has no credit. He says to one of his creditors, if you will supply me with food on credit I will pay you the old debt. Is not that a good consideration? I think it is. The contract is one of great benefit not only to the creditor but to himself, and there is nothing in s. 49 of the Bankruptcy Act of 1869 to prevent such a contract being enforced. I think, therefore, that the plaintiff is entitled to judgment.

CLEASBY, B. I am of the same opinion. Here is a contract to this effect: "If you will supply my family with meat upon credit,

1878

JAKEMAN v. COOK.

I will pay you my previous debt which has been discharged under the liquidation." There is a distinct promise, and a clear contract made upon good and valuable consideration. There is nothing in reason or law against such a contract, except so far as it may be prohibited or made unavailable by an Act of Parliament. Now, it is said that s. 49 of the Bankruptcy Act of 1869 has the effect of making the bankruptcy a defence to this action, and the defendant's case is rested on the authority of *Heatlier* v. *Webb.* (1) I should feel bound by that decision, but independently I should have come to the same conclusion. That was an action upon a simple promise to pay the old debt, a proceeding in a superior Court where there was a statement of claim. The defence set up the discharge obtained in the liquidation. The replication set up two answers: the second was that "since the close of the said proceedings the defendant promised and agreed to pay the full amount of the plaintiff's claim." The rest of the replication may be rejected, and the plaintiff's case considered to stand merely on the promise to pay the old claim. Under those circumstances, the Court held that s. 49 was an answer to the cause of action. There the cause of action occurred before the discharge, there being nothing since the discharge but a simple promise. Sect. 49 says: "in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge." It was held that there was nothing to exclude the operation of the section. That is the reason of the judgment, and with regard to the decision of Bacon, V.C., in *Jones* v. *Phelps* (2), Lord Coleridge says (3): "It is true that the case differed somewhat from this, inasmuch as it turned on the question whether the law previous to the present Act was applicable or the present law, but the Vice-Chancellor seems to have decided on the wider ground, that under the Act of 1869 a promise to pay a debt barred by bankruptcy was nudum pactum, as there was no consideration for it. Such authority, therefore, as there is, is in favour of the view we take." Lindley, J., says: "The plaintiff's counsel contends that the defendant cannot plead

(1) 2 C. P. D. 1. (2) 20 W. R. 92.

(3) 2 C. P. D. at p. 7.

in the language of the section that the cause of action occurred before his discharge, because the cause of action here is the subsequent promise to pay. This is no doubt a plausible way of putting the case, but whether it is correct depends on the meaning of the term 'cause of action.' The only cause of action mentioned in the writ of summons and the claim is clearly the old debt which accrued before the bankruptcy proceedings. This perhaps is a technicality, and might be met by an amendment, but I am of opinion that no amendment would make the case any better for the plaintiffs. It seems to me that the sense in which the term 'cause of action' is used in the statute must include cases where so much of the cause of action as constitutes the consideration for the promise has occurred before the discharge."

In the present case the cause of action did not occur before the discharge. The cause of action is the promise made and acted on after the discharge—made for a good consideration arising after the discharge. I do not think that s. 49 applies to a case like this, of a real bonâ fide contract for a valuable consideration.

Judgment for the plaintiff. (1)

Solicitors for plaintiff: *Layton & Jaques.*

Solicitor for defendant: *J. Cotton, for W. E. Tattershall, Sheffield.*

(1) Leave to appeal was refused.

1878
Nov. 18.

[IN THE COURT OF APPEAL.]

DAVIES AND OTHERS *v.* FELIX AND OTHERS.

Practice—Appeal—Misdirection—New Trial—Appeal against Judgment at Trial with Jury—Jurisdiction of Court of Appeal—Rules of the Supreme Court, Order XXXIX., Rule 1., *Order XL., Rule* 4.

During the trial of an action before a jury the judge was asked by the defendants' counsel to nonsuit the plaintiffs, or to direct a finding for the defendants, upon the ground that no evidence had been given in support of the plaintiffs' case; this the judge refused to do, and the jury found the issue left to them in favour of the plaintiffs. Upon the following day the judge directed judgment to be entered for the plaintiffs, and stated his reasons for holding that there was evidence to support the finding of the jury. The defendants appealed to the Court of Appeal against the judgment directed to be entered:—

Held, that the appeal would not lie; for the judgment was upon the face of it correct, so long as the finding stood unreversed, and the Court of Appeal has no power, in the first instance, to review the finding of a jury; and the defendants' ground of complaint being for misdirection, they ought to have applied to the Exchequer Division for a new trial under Order XXXIX., Rule 1.

Yetts v. *Foster* (3 C. P. D. 437) followed.

CLAIM alleged that David Evan, of Hendre, in the parish of Kilkennin, in the county of Cardigan, by his will dated the 19th of July, 1778, devised "all that messuage, tenement, and lands, with the appurtenances, commonly called and known by the name of Hendre, situate, lying, and being in the aforesaid parish and county, together with all and singular houses, outhouses, edifices, ways, waters, and watercourses, slangs, pieces, parcels, and places thereunto belonging," subject to certain limitations with an ultimate remainder "to my own right heirs for ever." The testator was seised in fee of Hendre, which, it was alleged, at that time comprised, amongst others, the parcels called by the respective names of Bwlchydwr, Llacaglas, Glanrhos, Mountaingate, Mounthope, and Bankbach. The preceding limitations became extinct or failed, and the plaintiffs were, with those defendants who defended as landlords, the right heirs of the testator. The plaintiffs claimed possession of the above-mentioned parts of Hendre and mesne profits.

The defence, amongst other allegations, denied that Hendre then comprised the places above-mentioned, or any of them.

The action came on for trial before Bramwell, L.J., and a jury, at the Glamorganshire summer assizes, 1877, held at Swansea, and the defendants contended that there was no evidence to go to the jury that the three parcels of land called respectively Llacaglas, Glanrhos, and Mountaingate formed in 1778 part of Hendre and passed under the devise above mentioned, and contended that the plaintiffs ought to be nonsuited, or that a finding ought to be directed for the defendants. The Lord Justice, however, declined to do this, and left it to the jury to find whether these three parcels of land were part of the property called or known as Hendre; the jury were of opinion that they were part of that property, and found for the plaintiffs for their undivided shares in the whole property sought to be recovered; but the Lord Justice declined to enter judgment on that day, because he wished to have time to consider whether there was any evidence to go to the jury with regard to Llacaglas, Glanrhos, and Mountaingate. On the following day the Lord Justice stated that he could not say that there was no evidence in the plaintiffs' favour to go to the jury, and also stated his reasons for coming to that conclusion. He directed judgment to be entered for the plaintiffs.

The defendants gave notice that "a motion will be made to the Court of Appeal by counsel for the defendants, by way of appeal from so much of the judgment of the High Court of Justice sitting at Swansea, and dated the 3rd of August, 1877, as relates to the places called Llacaglas, Glanrhos, and Mountaingate, and the mesne profits thereof respectively, that so much of the said judgment as aforesaid may be reversed or discharged, and that instead thereof judgment may be entered for the defendants with costs, or that so much of the said judgment as aforesaid may be reversed or varied, as to the Court of Appeal may seem meet."

B. T. Williams, Q.C. (*Coxon*, with him), for the plaintiffs. There is a preliminary objection to the hearing of this appeal. The jury found generally for the plaintiffs, and judgment was entered for them; that judgment is now appealed against, but the defendants' only contention will be that there was no evidence to go to the jury in support of the plaintiffs' claim, and that Bramwell, L.J., ought to have withdrawn the case from their

1878

DAVIES v. FELIX.

consideration; this is not an objection to the judgment, but to the finding of the jury, on the ground that they were misdirected by the judge; and as this Court has no power to question the finding, they cannot afford the defendants the relief asked for. The defendants ought to have applied to the Exchequer Division for a new trial. This appeal is, in fact, governed by *Yetts* v. *Foster* (1), and upon a similar principle in *Etty* v. *Wilson* (2) this Court held that it had not power to set aside a nonsuit at a trial with a jury.

[BRETT, L.J. I do not think that *Etty* v. *Wilson* (2) has much bearing upon the case before us.]

The judgment is regular upon the face of it, and cannot be impeached whilst the finding stands unquestioned.

J. W. Bowen, Q.C., and *Kenelm E. Digby*, for the defendants. This appeal is not against the finding of the jury upon matters of fact, but against the decision of the judge at the trial upon the question of law, whether there was evidence fit to be laid before a jury in support of the plaintiffs' claim, and whether the plaintiffs ought to have been nonsuited, or whether a finding for the defendants ought to have been entered. The defendants do not now deny that if there was any evidence in the plaintiffs' favour the finding must stand, and in this sense they accept the finding of the jury as to the facts; what they wish to dispute is the decision of the judge upon the facts after the finding had been given, for that decision contained a statement of the reasons why he directed the merely formal judgment to be entered for the plaintiffs. The defendants' remedy, therefore, was by an appeal to this Court from the judgment, and not by an application to the Exchequer Division for an order for a new trial. In *Yetts* v. *Foster* (1) the defendant's alleged ground of complaint was clearly misdirection before the finding, and after the finding the judge merely directed judgment to be entered in accordance with it.

B. T. Williams, Q.C., did not reply.

JAMES, L.J. I regret that the costs of this appeal have been uselessly incurred through a misapprehension as to the proper course of procedure; the mistake has arisen from the introduction of a new system, but it is a mistake which we cannot cure. This

(1) 3 C. P. D. 437. (2) 3 Ex. D. 359.

is an appeal from a judgment directed to be entered in a cause tried before a jury; but it is objected by the plaintiffs' counsel that the defendants are in truth dissatisfied with the finding of the jury, and that the only remedy open to them is a new trial; for it cannot be disputed that the judgment which has been entered is correct, so long as the finding stands. The defendants' counsel are in effect driven to admit that their contention must in substance be that the plaintiffs ought to have been nonsuited, or at least that a finding for the defendants ought to have been directed; therefore, what they really claim, is a new trial upon the ground of misdirection. Upon this appeal we have no power to set aside the finding; we must take it to be correct; we have no jurisdiction to hear and decide upon the points which the defendants' counsel desire to argue; for they are in truth objections to the finding of the jury and not to the judgment directed to be entered by Lord Justice Bramwell. This appeal must be dismissed.

BRETT, L.J. We must take it that at the trial Lord Justice Bramwell was asked to direct a finding for the defendants or to nonsuit the plaintiffs, but that instead of so doing he left to the jury the question of parcel or no parcel. An appeal to this Court is based upon the assumption that the findings of the jury are right; but the present defendants complain that the finding at the trial was wrong; and therefore the only remedy, which they can obtain, is a new trial. Before the coming into operation of the Supreme Court of Judicature Acts, 1873, 1875, the Courts at Westminster could not direct a verdict to be entered, unless leave had been reserved at the trial; and the consent of the parties to the cause was implied upon the reservation of this leave; I do not think that under those statutes and the rules made in pursuance thereof this Court has jurisdiction to set aside the finding of a jury for one party and to order it to be entered for the other. The right of appeal to this Court is regulated by the Rules of the Supreme Court, Order XL., Rule 4 (1); but where the cause has been tried before a jury, the only applications allowed to be made

(1) By Rules of the Supreme Court, Order XXXIX., Rule 1: "Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court.

1a. Applications for new trials shall

1878

DAVIES v. FELIX.

are against the judgment as entered upon the findings of the jury; and for the purpose of these applications the findings must be taken as correct. Order XL., Rule 4, does not enable the defendants to maintain this appeal, for the ground of their complaint is that the finding of the jury was wrong. The defendants might perhaps have obtained a new trial under Order XXXIX., Rule 1; but the application ought in the first instance to have been made to the Exchequer Division. We are not without authority upon this question, for *Yetts* v. *Foster* (1) is directly in point for our decision; and it seems to me upon authority, upon principle, and upon the construction of the Rules of the Supreme Court, that we cannot upon this appeal give the defendants the relief which they seek.

COTTON, L.J. I also think that this appeal cannot be maintained. In order to set right the alleged misdirection at the trial the defendants ought, within the prescribed time, to have applied, under Order XXXIX., Rule 1, of the Rules of the Supreme Court, to the Exchequer Division for a new trial; instead of so doing they have appealed, under Order XL., Rule 4, to this Court against the judgment entered in the cause.

JAMES, L.J. By way of supplement to the concluding remarks of Lord Justice Brett, I wish to say that in my opinion it is much more convenient that objections to findings of juries should in the first instance be considered in the High Court of Justice. Discussions as to findings necessarily involve discussions as to the

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be by motion calling on the opposite party to shew cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a judge shall enlarge the time:— . . . If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

Order XL., Rule 4: "Where at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them."

(1) 3 C. P. D. 437.

facts, and as a matter of practice it is much better that the facts proved at a trial should be thoroughly sifted in a Divisional Court, before the judges of this Court are called upon to determine whether the findings of the jury can be upheld.

1878

DAVIES v. FELIX.

Appeal dismissed. (1)

Solicitors for plaintiffs: *Hayes, Twisden, Parker & Co., for Griffith Jones, Aberystwith*

Solicitors for defendants: *Paterson, Snow, & Bloxam, for W. H. Thomas, Aberystwith.*

[IN THE COURT OF APPEAL.]

Nov. 12.

FAIRCLOUGH *v.* MARSHALL.

Mortgagor and Mortgagee—Parties—Covenant not to open House as a Beer-house—Injunction—Judicature Act, 1873 (36 & 37 *Vict.* c. 66), *s.* 25, *sub-s.* 5.

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee.

F., being owner of copyhold land, covenanted with S. to stand seised thereof in trust for him and his heirs, subject to a rent, and subject to a covenant by S. not to use any building erected thereon as a beer-house. All the estate of S. vested in the defendant. F. sold the land to the plaintiff, B. advancing the purchase-money, and it was conveyed to B., subject to a proviso for conveyance to the plaintiff upon payment by him to B. of the amount advanced. The defendant used the building erected upon the land as a beer-house:—

Held, that upon the general principles of equity, the plaintiff was entitled to restrain the defendant by injunction from using the building for that purpose without joining B.

Quære, whether the Judicature Act, 1873, s. 25, sub-s. 5, would have entitled the plaintiff to an injunction in his own name.

INJUNCTION to restrain the defendant from using a certain house as a beer-house.

At the trial at the Durham Summer Assizes, 1877, before Manisty, J., the following facts were proved:

In the year 1868, Fowler was the owner of certain copyhold

(1) The defendants, by notice of motion dated the 18th of November, 1878, applied to the Exchequer Division for an order extending the time for making an application for a new trial, notwithstanding that the time limited for making such application for a new trial had expired; the motion was, however, on the 26th of November, refused.

1878

FAIRCLOUGH v. MARSHALL.

land situate in the manor of Houghton, in the county of Durham, which he was laying out in plots for building purposes on a building scheme. Instead of granting in the usual way a lease for ninety-nine years, Fowler granted an equitable fee-simple of each plot, taking from the purchasers a covenant as to the way in which each plot should be used, intending that there should be a uniform practice with regard to all the building plots with which he was dealing; he also created an annual rent-charge issuing out of each plot.

In pursuance of this scheme, by a deed of the 14th of December, 1868, Fowler, in consideration of a sum of money paid to him, covenanted with T. Steel to stand and be seised of the piece of land in question upon certain trusts, the first thereof being to secure to Fowler, his heirs, sequels in right, and assigns an annual payment of 4*l.* 1*s.* issuing out of the ground, and subject thereto in trust for T. Steel, his heirs and assigns for ever; and T. Steel thereby covenanted for himself, his heirs and assigns, with Fowler, his heirs, sequels in right, and assigns to observe and perform certain rules and regulations prescribed by the deed. Amongst these rules and regulations was the following: "That no buildings for the time being on the said plot of ground shall at any time be used as a public-house, or tavern, beer-house, house for the sale of beer, or coffee-house, without the consent of the vendor, his heirs or assigns, in writing first had and obtained." The interest of Steel in the property was therefore that of an equitable owner of the plot in question, subject to a rent-charge.

The defendant was the assignee through divers mesne assignments of Steel, and he purchased with notice of the restrictive covenants.

Fowler after he had granted the plots in the manner mentioned sold the rents to divers persons. By a deed dated the 26th of November, 1876, after reciting that Fowler had, at the request of the purchasers of the rents, contracted with the plaintiff for the absolute sale to him of the annual rents and benefit of all the powers and remedies limited by the deeds conveying the building plots for securing the payment thereof and the benefit of the covenants and conditions, and also all the estate and interest whatsoever of Fowler and the purchasers of the rents in the

1878

FAIRCLOUGH v. MARSHALL.

building plots at the price of 1445*l.*, and also after reciting that R. S. Briggs and C. J. Briggs had, at the request of the plaintiff, and in order to enable him to complete his purchase, agreed to lend him the sum of 1100*l.* upon having the repayment thereof with interest secured in manner thereinafter expressed, it was witnessed that in pursuance of the contract with the plaintiff, and in consideration of the sum of 1100*l.* paid by R. S. Briggs and C. J. Briggs to Fowler, at the request of the plaintiff, and also in consideration of the balance of the purchase-money paid by the plaintiff to Fowler, the rents amounting to 72*l.* 5*s.* 4*d.* (1), and also the benefit and advantage of the covenants and conditions contained in the deeds conveying the plots, and on the part of the purchasers of the plots to be observed and performed, were granted unto R. S. Briggs and C. J. Briggs, their heirs, &c., subject to the proviso for conveying the same to the plaintiff, his heirs, &c., thereinafter contained; and it was further witnessed that, for the considerations aforesaid, Fowler, with the consent of the purchasers of the rents, covenanted with R. S. Briggs and C. J. Briggs that he would surrender into the hands of the lord of the manor the building plots, including the plot belonging to the defendant, to the use of R. S. Briggs and C. J. Briggs. The deed contained a proviso that if the plaintiff should pay to R. S. Briggs and C. J. Briggs the sum of 1100*l.* with interest they should at his request and costs grant and assure the rents, and should surrender the building plots to the use of the plaintiff. The deed also contained a declaration of R. S. Briggs and C. J. Briggs that they were joint tenants of the 1100*l.* as well in equity as at law; and also a covenant by the defendant to R. S. Briggs and C. J. Briggs to pay the 1100*l.*, with a power of sale upon default.

plaintiff?

By a surrender and admittance, dated the 24th of November, 1876, R. S. Briggs and C. J. Briggs were admitted tenants of the building plots by the lord of the manor of Houghton, Fowler having surrendered them to their use.

At the foot of the surrender was the following memorandum: "Be it remembered that the above-written surrender is made on the occasion of a sale to R. Fairclough, in consideration of 1445*l.*,

(1) That sum included the particular rent of 4*l.* 1*s.*

1878

FAIRCLOUGH v. MARSHALL.

and on the occasion of a mortgage to the said R. Fairclough to R. S. Briggs and C. J. Briggs for securing 1100*l.* and interest."

On the plot of ground purchased by the defendant from T. Steel a house had been erected, which had been converted into a beer-house; it was sought in this action, by an injunction, to restrain the defendant from using this house as a beer-house. It was admitted that Messrs. Briggs, the mortgagees, had not given notice to take possession, and that the plaintiff, as mortgagor, was in receipt of the rents.

On these facts it was contended, on behalf of the defendant, that the plaintiff could not maintain an action for an injunction, as he had no interest in the property. It was contended, on behalf of the plaintiff, that he was the beneficial owner in possession, and that at all events he was, by virtue of the Judicature Act, 1873, s. 25, sub-s. 5 (1), entitled to an injunction without joining the mortgagee.

The learned judge discharged the jury by consent, and reserved the case for further consideration.

After argument, the learned judge directed judgment to be entered for the defendant, on the ground that the plaintiff had not sufficient interest to maintain an action for an injunction; and also on the ground that s. 25, sub-s. 5, of the Judicature Act had no application to the case.

The plaintiff appealed.

Hemming, Q.C., *Wildey Wright*, and *Granger*, for the plaintiff. The question is whether the plaintiff has a right, either independently of the Judicature Act, 1873, or by the aid of s. 25, sub-s. 5 of that Act (1), to an injunction to restrain the defendant from opening a beer-house in disregard of the covenant contained in the conveyance to Steel, his predecessor in title. By the deed

(1) By s. 25, sub-s. 5 of the Judicature Act, 1873, a mortgagor entitled for the time being to the possession or receipt to the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

of the 14th of December, 1868, the legal estate is left in Fowler; he is to hold it to secure his rent-charge, and subject to that to hold it in trust for the purchaser Steel, and Steel binds himself not to set up a beer-house on the land. By the deed of the 24th of November, 1876, Messrs. Briggs, as mortgagees, have the legal estate, and the plaintiff, whenever he chooses to pay them off, may get the legal estate transferred to him. But neither the defendant nor any one through whom he claims has any legal estate; he has only the right to compel Messrs. Briggs and the plaintiff, to hold that legal estate for his benefit, subject to securing the rent of 4*l.* 1*s.*, and subject to the right to enforce the covenants. It will be contended on behalf of the defendant, first, that the burden of this covenant does not run with the land as against him; therefore he is not liable on it: secondly, that the right to compel the observance of the covenant did not pass to the plaintiff, because he has not the legal estate.

As to the first point, it is immaterial here whether the covenant runs with the land, so as to vest the benefit in the plaintiff and pass the burden upon the defendant. The rule is, beyond all question, if a man acquires possession of land, with notice of a restrictive covenant, he is just as much liable to be restrained from disregarding that covenant as if it had been his own covenant, or if it had been a covenant the burden of which ran with the land. That doctrine was fully established in the case of *Tulk* v. *Moxhay*. (1) It is not a breach of contract or covenant that is restrained, but a burden being imposed on the conscience of the person who acquires the land, with notice of the covenant, he is not permitted to commit a wrong and disregard the covenant. Whether it is a wrong done by a person who is bound not to do it by equitable considerations, or whether it is a wrong done by a person who has contracted not to do it, the Court of Equity in both cases equally restrains the commission of the wrong.

Secondly. It is not necesary for the plaintiff to shew that he has the legal estate; it is enough that he is a person interested in the estate or in the covenant, and who may be damnified by its being disregarded. The plaintiff is one of a class of persons

(1) 2 Phil. 774.

1878

FAIRCLOUGH v. MARSHALL.

intended to be benefited by this covenant, and he is entitled to its protection whether or not the legal estate is in him. Clearly the object of this covenant is to prevent this particular plot, and any portion of the whole building estate, from being deteriorated by the existence of a beer-house. Any owner of a plot of land of this building scheme has a sufficient interest to entitle him to ask for an injunction against the defendant for opening a beer-house. A fortiori, a person who acquires this identical plot has the largest possible interest in preventing the covenant from being disregarded. The owner of the equity of redemption has a larger interest than a mortgagee in enforcing the observance of the covenant; a mortgagee has only a pecuniary interest, and it is immaterial to him whether or not the estate is depreciated so long as it is large enough to satisfy the mortgage; while, as regards the mortgagor, anything that will injure the estate, even to the least degree, will injure him. The mortgagee is only an incumbrancer. A Court of Equity looks to the substance and not to the form, and if the beneficial owner asks for an injunction, it never inquires whether any one else is entitled. The person who has the largest interest is the person who ought to protect the estate, and it is the mortgagor whose interest it is most carefully to nurse it.

Thirdly. Section 25, sub-s. 5 of the Judicature Act, 1873, expressly allows the mortgagor to bring the action in his own name. The important words are, "may sue to prevent or recover damages in respect to any trespass or other wrong relative thereto in his own name." The complaint here is that the defendant is in possession of the land with notice of the covenant, and has done the plaintiff a wrong by disregarding it. It might be said, on the other side, that the words "wrong relative thereto," that is to the land do not cover this particular wrong. But there is an injury to the plaintiff which is not technically called a breach of covenant; it is a wrong done by the defendant; if it is a wrong done against the mortgagees the plaintiff under this section can sue for it in his own name.

Herschell, Q.C., and *McClymont* for the defendant. As to the first point, it is conceded that if the plaintiff has a sufficient interest to maintain an action for an injunction, the breach may be restrained, although the covenant does not run with the land.

But, secondly: the plaintiff has not such an interest as entitles him to bring this action for an injunction. The property was never conveyed to him, it was conveyed to the mortgagees, and not only does the deed convey the property to the Messrs. Briggs, but the benefit of the covenants are also assigned to them, and it is only they who can enforce their observance; for they are the legal owners and the assignees of the actual covenantee. There are many substantial reasons why the mortgagor should not be permitted to sue without the mortgagees. The closing of the beer-house might materially diminish their security. The fact that the business of beer-selling is carried on on the premises might be the very best security for the mortgagees' ground rents; and it might be, if this business was not carried on, the mortgagees would have no adequate security. The fact that such a business was carried on, might have been the inducement to the mortgagees to lend the money. It is not permitted to the plaintiff, who has merely an equity of redemption, behind the back of the mortgagees to restrain a use of the house which might be most beneficial to their security. If the mortgagees did not give their consent for an application for an injunction, a Court of Equity would not grant it at the mere solicitation of a mortgagor.

Thirdly. Sect. 25, sub-s. 5, does not empower a mortgagor to bring a suit in a case like the present. That section allows the mortgagor to sue in his own name in three instances: he may sue for the possession of the premises; or for the recovery of the rents and profits; and to prevent or recover damages in respect of any trespass or other wrong relative thereto, that is for trespass or other wrong in the nature of a tort. This clearly is not a wrong analogous to a trespass, which is the governing word of the section. Wrong means a wrong in the ordinary legal sense of the term and not a breach of covenant. Take the case of a covenant to repair and a breach of that covenant: that is just as much a wrong as the breach of the covenant in this case; surely the breach of covenant to repair would not be a wrong within the meaning of that word in sub-s. 5. The plaintiff therefore, having no title whatever, is not entitled to maintain this action.

Hemming, Q.C., in reply.

1878

FAIRCLOUGH v. MARSHALL.

BRAMWELL, L.J. With the greatest respect for my learned Brother Manisty, this judgment cannot be supported. In the first place, if the conveyance had been made to Fairclough in the terms in which it was made to the Messrs. Briggs and no money had been borrowed, and if there had been no relation of mortgagor and mortgagee, it is admitted that the plaintiff could have maintained this suit. But it is said the conveyance having been made to the Messrs. Briggs with a mere reservation to the plaintiff of a right to have a conveyance when he pays off the debt, the plaintiff is not in a position to ask for an injunction, at all events unless he joins the mortgagees. It was argued that this is not the ordinary case of a mortgagor and mortgagee; for a mortgagor is in the position of a man who has had an estate, and has parted with it; but here the plaintiff has never possessed any estate. But if we look to the substance of the thing and not the form only, we shall see that this is in point of fact the ordinary case of a mortgage. It is recited that Fowler has contracted with the plaintiff to purchase the estate; the conveyance is made to Messrs. Briggs because they have lent the money, and then there is a covenant to convey the estate to the plaintiff on repayment of the money, which is precisely like the ordinary covenant to re-convey; and then there is a covenant to pay the mortgage money. In substance there is no distinction, and we ought to treat the matter as an ordinary mortgage. The plaintiff is therefore entitled to ask for this injunction. Then must he join the mortgagees who have never interfered nor claimed a right to interfere in any way with the management of the estate? It is not shewn that the value of the security will be impaired by the injunction asked for, and so far as the substantial question is concerned the whole difficulty has arisen out of the surmise of counsel that in certain supposed cases the mortgagees might raise objections. As far as we can see Fairclough stands in the position of beneficial owner of the property, subject to an incumbrance for the benefit of the Messrs. Briggs. This suit is brought to restrain the defendant in respect of a covenant which he has broken. First, then, need the Messrs. Briggs have been joined before the Judicature Act, 1873, was passed? I think I can answer with very considerable confidence that they need not have been joined, and when we look at the principle upon which a Court of

Equity acts, that rule is perfect and reasonable. If they need not be joined as plaintiffs, it is clear it cannot be necessary to join them as defendants, for no remedy is sought or can be obtained against them. If they had interfered and suggested that the value of their security would be diminished, whether they ought to be made defendants or not, is a point we need not discuss. I cannot help thinking it is a very doubtful matter. The plaintiff might say, "All I want is a remedy against the wrong-doer; if he is not a wrong-doer, because he is acting under the directions of the mortgagees, let him set that up as a defence." But I am quite sure that Order XVI., Rule 13, would justify us in making an order against the defendant alone which should bind him. I see no reason for making Messrs. Briggs, the mortgagees, defendants, and if there had been any doubt, the rule I have just mentioned would have obviated the necessity of doing so. I think, therefore, that this proceeding was rightly taken by the plaintiff as sole plaintiff against the defendant as sole defendant.

I will add one word as to s. 25, sub-s. 5 of the Judicature Act, 1873. I do not think that sub-section has any application to this case, it only applies to cases where the mortgagor could not, either in his own name or in conjunction with the mortgagee, have brought an action. And I may further observe that if by that sub-section the mortgagor may sue for possession or rents and profits or in respect of trespass or other wrong, meaning wrong independent of any contract or duty, it is possible that the mortgagor may sue for rents and profits, but not for breach of covenant to insure against fire or to repair. I do not think this can have been meant, and perhaps hereafter that consideration may induce the Court, when the question is properly raised, to put some other construction on the word "wrong."

I think that this action was rightly brought by the sole plaintiff against the sole defendant, and therefore the case must go down again to be dealt with further (1); or if the learned judge declines to deal further with it, it must come back to us and we must do the best we can with it.

(1) Manisty, J., having decided that the action was not maintainable through the non-joinder of the mortgagees, other objections, as to the plaintiff's right to sue, were not determined.

1878

FAIRCLOUGH v. MARSHALL.

BRETT, J. This is a suit for an injunction to restrain the defendant from using certain premises in a manner inconsistent with the contract of his vendor of which the defendant had notice. It is not disputed that there was an original covenant between Fowler and Steel, nor that the defendant has his estate by devolution from Steel. But, as I understand, it is argued in the first place, that the plaintiff has no interest in this matter, because he is not the equitable owner by devolution from Fowler, who has conveyed to the Messrs. Briggs, and that they, both at law and in equity, are the true owners of the property. The objection then would go this length, not merely that the mortgagees ought to have been joined, but that the plaintiff is not entitled to institute these proceedings. It seems to me that this contention cannot be maintained. Fowler was the owner of a certain interest in the property. A contract was made between Fowler and the plaintiff, of which the intention was to sell the property to the plaintiff, and a price was fixed between them. It is not denied that the contract was between them; but it is objected that at the request of the plaintiff, who had to borrow money to complete the purchase, the conveyance was made direct to Messrs. Briggs. But in that conveyance there is a recital of the loan, and a right given to the plaintiff, on payment of the money to Messrs. Briggs, to come into possession as if the conveyance had been made to the plaintiff himself. Whatever may have been the form of the deed, the contract being clear, and the right to redeem clear, in equity the plaintiff is equitable owner of Fowler's interest by devolution from Fowler; and has merely mortgaged that interest. The plaintiff, therefore, is the representative of Fowler's interest, and the defendant of the interest of Steel. If therefore there was no mortgage, on the principle established by *Tulk* v. *Moxhay* (1), the defendant is rightly made the defendant, and the plaintiff would be entitled to the relief he asks. But it is said, that because of the mortgage Messrs. Briggs ought to be made parties: but we have the highest possible authority for saying, that by the practice of the Court of Chancery the mortgagee in such cases need not be joined. It has further been argued that as a matter of principle, there is no reason why he should; a position much fortified by the rule of Chancery

(1) 2 Phil. 774.

practice. It seems to me that the point has been fairly made out; and it rests upon a most important doctrine; namely, that when a mortgagee has not taken possession, and has done nothing, but has left the property in the hands of the mortgagor, the mortgagor has a right as long as the mortgagee remains inactive, to put in force all the rights of property existing between himself as equitable owner and the occupier, without reference to the mortgagee. So long as the mortgagee does not interfere, the mortgagor, in attempting to put in force such a right as this between the owner and the occupier, may do so without reference to the mortgagee. In that case the mortgagee need not be made a party. But even if that doctrine is wrong, the utmost that can be said is that the mortgagee ought to be a party as well as the mortgagor. It is not the case of a wrong party having sued, but of a right party requiring that another should be joined with him. But that is not a ground on which the suit should be dismissed; the utmost that should have been done was to delay the trial that the mortgagees might be made parties. Whether they should be made parties by their own application, or under Order XVI., Rule 13, is immaterial; the judgment must be wrong if the objection taken was want of parties. Therefore if we deal with the case as if sub-s. 5 of sect. 25, was not applicable, the plaintiff has a right to sue alone; or at most Manisty, J., should have ordered the mortgagees to be joined.

With regard to sub-s. 5 of sect. 25, that is not an enactment to prevent parties from suing who could have sued alone before the Act—it is an enabling not a disabling section. Therefore, on all points, the judgment of Manisty, J., cannot be supported; and the case must go back to him for the consideration of the other matters in question.

COTTON, L.J. In this case, Manisty, J., decided in favour of the defendant, on the ground that in his opinion the plaintiff had not sufficient interest to bring the action, that is, not that others ought to be joined as plaintiffs, but that the plaintiff had no interest in the property. Is that a correct view? It is urged that the mortgagees are not plaintiffs, and the plaintiff as mortgagor has no interest in the estate, but that argument in my opinion

1878

FAIRCLOUGH v. MARSHALL.

cannot prevail. We are here to recognise equities, and to deal with substance rather than form. It is not the mortgagees who are the owners, but the mortgagor. The mortgagor is the beneficial owner, subject to the incumbrance, and the plaintiff is in the position of a mortgagor having the beneficial ownership of a rent issuing out of the land and certain other benefits. This suit is not brought to enforce a covenant, but on the ground that the defendant, having purchased land with notice of restrictions as to its use, is not in a position to use it in violation of those restrictions; and any one entitled to have the benefit of the restricting covenants, may come to a Court of Equity to restrain the defendant, not on the ground that he is breaking a covenant which runs with the land, but on the ground that he is dealing with the land inequitably. And the plaintiff has an interest in the performance of the covenant. That disposes of the first ground of objection. In my opinion, whether the mortgagees ought to have been joined or not, the plaintiff had sufficient interest to bring this action. Ought he then to have joined the mortgagees? If he ought, judgment ought not to have been given for the defendant, but the judge ought to have directed, under Order XVI., Rule 13 or 17, that the mortgagees should be served with notice or joined as defendants. These rules especially provide for the joinder of parties, Rule 17, where it appears to the Court that the question ought to be determined with reference to some third person, and Rule 13 where necessary parties have not been joined. In these cases the judge may order the necessary parties to be added; but he should not give judgment for the defendant. Let us now consider the two grounds upon which it has been said that the mortgagees ought to have been joined. First, it is said that all parties interested ought to be joined. But in suits of this character it is not necessary that all parties interested should be before the Court. This is decided by the case of *Western* v. *MacDermott* (1). Any one of the parties interested may sue. Then is it necessary, having regard to the interest of the mortgagee? The exact relation of mortgagor and mortgagee, when the mortgagee is not in possession, is not very clearly defined. But it is sufficient to say that if the mortgagee does not assert his right to

(1) Law Rep. 2 Ch. 72.

possession, and the mortgagor is left to manage the property, he has a right to insist, without reference to the mortgagee, on the observance of any obligations, the non-observance of which would injuriously affect the premises. The mortgagee can come in if he likes. If to restrain the act of which the plaintiff complains would have damaged the mortgagees' security, or even if there was any substantial question of that kind, the Court might have said, "we cannot decide without hearing the mortgagees; make them parties and give them an opportunity of stating their views." But in this case all this is the merest surmise. In a case of this sort, unless there is a probability that the relief for which the plaintiff the mortgagor sues will injuriously affect the interest of his mortgagee, the mortgagee ought not to be brought before the Court on a mere suggestion of a possibility that he may be prejudiced. Therefore, I am of opinion that in the present case the mortgagees need not be brought before the Court. The learned judge was wrong in saying the plaintiff had no interest, and the case ought to go back, in order that the remaining points may be dealt with.

Judgment reversed.

Solicitors for plaintiff: *J. Scott & Clark.*

Solicitors for defendant: *Belfrage & Middleton, for W. M. Skinner, Sunderland.*

[IN THE COURT OF APPEAL.]

Dec. 20.

GARDNER AND ANOTHER *v.* IRVIN AND ANOTHER.

Practice—Discovery of Documents—Documents protected from production by reason of Privilege—Privilege—Affidavit as to Documents, sufficiency of—Rules of Supreme Court, Order XXXI., rule 13.

An affidavit as to documents by a party who objects to produce them is insufficient, if it merely states "that the documents are privileged;" it ought to state and verify the facts upon which the objection is grounded.

CLAIM: That certain boxwood timber was lying in six warehouses at Poti, a port in the Black Sea, in the empire of Russia; the timber was the property of the plaintiffs, and they were entitled to the possession of it; the timber had been bought from

1878

GARDNER v. IRVIN.

Messrs. D'Isidare & Salonikidi, and had been delivered to the plaintiffs, and the plaintiffs had paid for the same; whilst the timber was in the warehouses, certain disputes arose between the plaintiffs, as purchasers, and D'Isidare & Salonikidi, as vendors, of the timber, and the plaintiffs took legal proceedings against the vendors in the courts in the empire of Russia. In the course of the legal proceedings an order was made that the timber should be arrested and sequestered for the due performance of any judgment which might afterwards be given in the proceedings. In 1872, one Vonticiano, as agent of the defendants, made a claim to the possession of the boxwood, and after the making of the order arresting the same, Vonticiano, as agent of the defendants, took legal proceedings against the plaintiffs to enforce his rights and those of the defendants to the timber; D'Isidare & Salonikidi were, according to the law of Russia, made parties to the proceedings. The court, being the High Court of Justice of Tiflis, decided by its judgment, dated the 19th of July, 1877, that the boxwood in four of the warehouses was the property of the plaintiffs; and the judgment was and is valid, final, and conclusive according to the law of Russia, not only between the plaintiffs and Vonticiano, but also between the plaintiffs and the defendants, as domini litis of the proceedings, and the defendants were and are liable to pay the costs to the plaintiffs under the judgment.

Defence: a denial of all the material allegations in the statement of claim.

An order having been made at the instance of the plaintiffs for discovery, the defendants made an affidavit stating that they were in possession of certain documents relating to the matters in question in the action set forth in the 1st and 2nd parts of a schedule annexed to the affidavit, and that they objected to produce the documents in the second part of the schedule; and the affidavit further stated "that one reason for objecting to produce the said documents set forth in the second part of the schedule is that the same are privileged." The documents in the second part of the schedule were: "correspondence between ourselves and our solicitors; correspondence between our solicitors and their agents; cash-books, ledgers, and accounts; writ of summons, statement of claim and other pleadings, counsel's opinions, statement of case

in Russian courts prepared by attorney for Vonticiano, including copies of depositions and evidence given."

On the 2nd of November, 1878, a summons was served on the defendants for a further and better affidavit of documents; it was heard on the 6th of November, before Lush, J., who made no order; an appeal from the decision of the learned judge was then made to the Divisional Court. On the 13th of November, after argument, the appeal was dismissed.

The plaintiffs appealed.

Crompton, for the plaintiffs. The affidavit made by the defendants is insufficient; it states merely that the documents are privileged, and yet it is clear from the documents set out in the schedule that some of them, the cash-book, ledger, and accounts, primâ facie, are not privileged. The defendants in their affidavit ought to set out the facts and claim the privilege. The Court could then see whether on the facts the defendants were justified in claiming privilege. With regard to the correspondence, the plaintiffs are entitled to have the dates and addresses of the letters, in order to judge whether they were confidential communications between the defendants and their solicitors in their character of solicitors, and whether it was with reference to this litigation. The plaintiffs are entitled to have from the defendants a better affidavit, setting forth the grounds on which the privilege is claimed: *Minet* v. *Morgan*. (1)

[BRAMWELL, L.J. Order XXXI., rule 13, with Appendix B, Form 9 (2), do not appear to have been brought to the attention of the Divisional Court. Paragraph 3 of Form 9 states "here state upon what grounds the objection is made, and verify the facts as far as may be;" that has not been done.]

(1) Law Rep. 8 Ch. 361.

(2) Order XXXI., rule 13: The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made [that is, for producing documents] shall specify which, if any, of the documents therein mentioned he objects to produce, and it may be in the Form No. 9 in Appendix B. thereto with such variations as circumstances may require.

Appendix B, Form 9: Form of affidavit as to documents. 2. I object to produce the said documents set forth in the 1st and 2nd schedule hereto. 3. That [here state upon what ground the objection is made, and verify the facts as far as may be.]

1878

GARDNER v. IRVIN.

FitzAdam, for the defendants. The affidavit as to the correspondence is sufficient. The statement that the correspondence was between the defendants and their solicitors is in itself a sufficient statement of a fact to support the claim of privilege.

[COTTON, L.J. The affidavit ought at least to state how many letters there are.

BRAMWELL, L.J. The affidavit does not state the grounds on which the cash-book and ledger are privileged.]

That does not in any way prejudice the plaintiffs; they can take out a summons for inspection, and upon that application the matter would be discussed and an order made. According to *Minet* v. *Morgan* (1), which was approved of in *Corporation of Hastings* v. *Ivall* (2), this affidavit is sufficient. The form, No. 9, contained in the appendix, is merely a skeleton form, and has been substantially complied with.

Crompton, in reply.

BRAMWELL, L.J. I think that this appeal should be allowed. We are not differing from the Court below, for it would appear that the rule and the form given in the appendix were not brought to the attention of the learned judge or of the Court. It is only necessary, in deciding this case, to read the rule to see if there has been a compliance with it. Clearly there has not. The affidavit does not satisfy the requirement of rule 13, Order XXXI. As it is the plaintiffs' fault that the order and rule were not brought to the attention of my Brother Lush and the Court below, these costs must be costs in the cause.

BRETT, L.J. I think that rule 13 of Order XXXI. has not been complied with. The counsel for the defendants argue that the form given in the Act is only a skeleton form which has been filled up in the affidavit. I think that the skeleton still remains a skeleton, and the affidavit is insufficient. The defendants ought to verify on oath the facts on which they claim the privilege; that is wholly omitted, and the affidavit is clearly insufficient by reason of the omission.

COTTON, L.J. I am of opinion that the appeal must succeed,

(1) Law Rep. 8 Ch. 361. (2) Law Rep. 8 Ch. 1017.

and that a better and further affidavit should be made. It is said that the question might be raised on an application for the inspection of documents, as the present affidavit sufficiently identifies the documents, and that afterwards a further and better affidavit might be made; but the plaintiffs are entitled to make this application. This affidavit does not follow rule 13 of Order XXXI. and the form given in the appendix, and the plaintiffs have a right to call upon the defendants to file a better affidavit. How can it be said that this affidavit is sufficient; in the body of the affidavit the defendants simply say "that the same are privileged," and in the schedule they set out the documents, some of which clearly are not privileged. They ought to say not only that the documents are privileged, which is a statement of law, but they ought to set out the facts from which we can see that the defendants' view of the law is right. Cash-books and ledgers primâ facie are not privileged.

An affidavit in answer to an application for discovery must be construed strictly, because the other side cannot adduce evidence to contradict it. The person seeking discovery is bound by the affidavit made by his opponent, and therefore it ought to be full. It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor, the letters must be professional communications of a confidential character for the purpose of getting legal advice. I think that the plaintiffs are not entitled to have the dates of the letters and such other particulars of the correspondence as may enable them to discover indirectly the contents of the letters, and thus to cause the defendants to furnish evidence against themselves in this action. The law was very recently correctly laid down on this point in this Court. (1)

This affidavit is insufficient, and the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Crowder, Anstie, & Vizard, for Yates, Son, & Stananought, Liverpool.*

Solicitors for defendants: *Gregory, Rowcliffes, & Rawle, for Charnley & Finch, Preston.*

(1) *Taylor* v. *Batten*, 4 Q. B. D. 85.

1878
Dec. 4.

IN THE MATTER OF THE TRUSTS OF THE WILL OF THOMAS DUTTON, AND OF THE PETITION OF JOHN NASH PEAKE AND ANOTHER.

Will—Perpetuity—Gift to Building Fund of Mechanics Institution—Literary and Scientific Institutions Act, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33.

An Athenæum and Mechanics Institution was established and kept on foot by the subscriptions of certain inhabitants of Tunstall, for the purpose of providing a lending and reference library and a reading room for the use of members. By one of the rules all the property of the institution was vested in the trustees for the time being; and by another rule the society was not to be dissolved unless by resolution of nine-tenths of the members present at a specially convened general meeting, confirmed by a similar resolution at a second meeting. A sinking fund had been established to pay off a mortgage debt on the building occupied, which was the property of the institution. A bequest was made of a sum of money to the trustees for the time being of the institution, to be applied towards "the building fund in connection therewith":—

Held, that the bequest was void as tending to a perpetuity.

THIS was an appeal from a judgment of the county court of Staffordshire, holden at Burslem and Tunstall.

Thomas Dutton by his will dated the 10th of August, 1874, after directing the payment of certain legacies, devised and bequeathed the remainder of his personal estate, and all his real estate, to his wife and Allen Beckett Lownds, the executors and trustees of his will, upon trust, to get in and convert the same into money, and invest the proceeds and pay the annual income to his wife for her life, and from and immediately after her death the testator gave and bequeathed the capital, as well as income of such proceeds and investments, "unto the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith."

The testator died and his will was proved by the executors named therein. The testator possessed no real property. On the death of the wife, the surviving executor, under the Trustee Relief Acts and the County Court Act, 1867, paid the fund, amounting to 431*l.* 2*s.* 2*d.*, into the Post Office Savings Bank to abide the order of the county court.

The trustees of the Tunstall Athenæum and Mechanics Institution petitioned that the money should be paid to them as such

trustees, to be applied by them as directed by the will. The case came on for hearing, and the next of kin of the testator, the executor, and the trustees of the institution, were represented. It appeared by the evidence that the institution was founded for the purpose of supplying a library, consisting of a library of reference and a circulating library, and a reading room, and for holding public lectures and classes for mutual improvement. The institution occupied a house purchased by the committee. There was no "building fund," but there was a "sinking fund," formed by resolution of the committee, for the purpose of paying off a mortgage debt on the premises. The rules relating to the constitution of the society, so far as material to the question in this case, were as follows:

1. "The members of this institution shall consist of

(*a*) "Donors of 10*l.* or upwards in money or books at one time, who shall be invested with all the privileges of class *b* for life.

(*b*) "Honorary subscribers of 1*l.* and upwards annually, who shall be eligible to any office, and entitled to all the privileges of the institution.

(*c*) "Subscribers of 10*s.* per annum, with 1*s.* entrance fee, who shall be entitled to all privileges as above.

(*d*) "Subscribers of 5*s.* per annum, and 6*d.* entrance fee, entitling them to the use of the reading room or library separately, as may be determined upon at the time of entering.

4. "The institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by the like majority at a further special general meeting, to be called within not less than one or more than three calendar months from the passing of such first resolution.

5. "The property and effects of the institution shall from time to time be vested in the trustees for the time being in trust for the general benefit of the members.

45. "No member, on withdrawing from this institution by forfeiture, expulsion, or otherwise, shall be entitled to claim any share or interest in the property of the institution."

By the judgment of the county court the gift to the trustees of

1878

RE DUTTON.

the institution was declared void under 9 Geo. 2, c. 36, on the ground that it was a bequest of money to be laid out in land for a charitable purpose, and it was directed that the property should go amongst the next of kin.

A rule was obtained, calling on the executors and the next of kin to shew cause why the judgment or order of the judge of the county court should not be set aside, and an order made in the terms of the petition on the ground that the institution was not a charity, and that the gift was not void for perpetuity, or on the ground that if the institution was a charity the gift was not void under 9 Geo. 2, c. 36.

May 10, 1878. *A. Charles, Q.C.*, for some of the next of kin. The question is whether the gift is void, either as a gift to a charity of money to be expended in land or as tending to create a perpetuity. As to the first point there is no direction given in the will that land is not to be purchased. On the other point, although the 4th rule contains a power to dissolve the society, it is clearly contemplated that the society is to continue. The case is not distinguishable from *Carne* v. *Long*. (1) [He was then stopped.]

English Harrison appeared for others of the next of kin.

J. Robins, for the executor.

A. D. Tyssen, and *Sidney Woolf*, for the trustees of the institution. This is a gift in such a mode as to make the subject of it part of the property of the society, and such a gift is good; *Cocks* v. *Manners* (2); *Stewart* v. *Green*. (3) The society, if it were dissolved, might divide the property among the then members, as in *Brown* v. *Dale* (4). In *Carne* v. *Long* (1) the gift was to the trustees, and their heirs for ever, on trust in effect to apply the rents each year for the benefit of the institution, and the members had no power to sell the land. In *Cocks* v. *Manners* (2) Vice-Chancellor Wickens distinguished *Carne* v. *Long* (1) on this ground.

A. Charles, Q.C., in reply. This is an institution to which 17 & 18 Vict. c. 112 by s. 33 applies, and by s. 30 of that Act, upon a

(1) 2 D. F. & J. 75; 29 L. J. (Ch.) 503.
(2) Law Rep. 12 Eq. 574.
(3) 5 Ir. Eq. 470.
(4) 9 Ch. D. 78.

dissolution, the members would receive no profit, but the fund would go to some other institution, determined as there pointed out.

Cur. adv. vult.

Dec. 4, 1878. KELLY, C.B. This is an appeal from the judgment of the county court, and the question is whether, under the will of one Thomas Dutton, the trustee and executor of whose estate paid money into the Post Office Savings Bank under the Trustee Relief Acts, a bequest, to the trustees for the time being of the Tunstall Athenæum and Mechanics Institution, can be supported. The first point raised is whether this was to be treated as a gift or bequest to a charitable institution, and independently of that there is another question, whether the gift was void for perpetuity. The terms of the bequest are to the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith. If this institution is a charity this bequest would probably be held void under the Mortmain Acts. When, however, we look to the rules which set out at great length the objects of the institution, we find that it is in reality a species of club in which a number of persons come together for literary purposes and mutual improvement. Under these circumstances the case of *In re Clark's Trusts* (1) is applicable, where Vice-Chancellor Hall deals with this question and decides that an institution for mutual benefit is not a charity.

The principal question, however, argued before us was whether the bequest was a valid one or whether it was void on the ground that, looking at the express terms of the bequest, it tended to a perpetuity. I am of opinion that it is void on this ground. In the case of *Carne* v. *Long* (2) the devise was of freeholds to "the trustees for the time being of the Penzance Public Library to hold to them and their successors for ever, for the use, benefit, maintenance, and support of the said library." Those are certainly stronger words than appear in this bequest, but looking to the rules and constitution of this society, it appears to me that it need not come to an end, so that though this bequest does not

(1) 1 Ch. D. 497. (2) 2 D. F. & J. 75; 29 L. J. (Ch.) 503.

1878

Re DUTTON.

contain the strong words of that in *Carne* v. *Long* (1) the principle of that case must apply. The Lord Chancellor in his judgment, said, "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as ten members remain. The devise therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but so long as ten of the members of the society shall remain." On that ground the decision of the Vice-Chancellor was reversed. There are several cases, among others *Thomson* v. *Shakespear* (2), which go to shew that where by the constitution of the society there is nothing necessarily to put an end to its existence, so that it may last an indefinite time, and the gift is in such terms as to make the subject of it an accession to the capital or permanent property of the society, and not a sum to be brought into the annual accounts as part of the year's income to be disposed of by the then members, then there is a tendency to a perpetuity and the bequest is void. For these reasons, I think the next of kin are entitled to the judgment of the Court, and the appeal must, therefore be dismissed.

HUDDLESTON, B. I am of the same opinion. I think this is clearly not a gift to a charity, but that the bequest is void on the ground that by it the testator was aiming at creating a perpetuity. We were referred to the rules of the institution, and it was said there was nothing to prevent the dissolution of the society and the division of the property, so that the case would resemble that of *Cocks* v. *Manners* (3), where there was a bequest to a voluntary

(1) 2 D. F. & J. 75; 29 L. J. (Ch.) 503.
(2) 1 D. F. & J. 399; 29 L. J. (Ch.) 276. (3) Law Rep. 12 Eq. 574.

association of ladies for pious and charitable purposes. This argument, however, if well founded, was met by the contention that under the Literary and Scientific Institution Act, 17 & 18 Vict. c. 112, s. 30, that could not be done. That Act seems to shew that the money could not be appropriated among the members. On the whole, I am of opinion that this bequest does tend to a perpetuity and is void.

Rule discharged. (1)

Solicitors for petitioners: *Llewellyn, Ackrill, & Hammack, for Llewellyn & Ackrill, Tunstall.*

Solicitor for next of kin: *H. Tyrrell.*

Solicitors for trustee: *Norris, Allens, & Carter, for G. Smith, Tunstall.*

WOODGATE *v.* GODFREY.

1879

Feb. 17.

Bill of Sale—Inventory of Goods with Receipt attached—Receipt of Sheriff's Officer for Purchase-money of Goods sold under Execution—Bills of Sale Act, 1854 (17 *&* 18 *Vict. c.* 36), *ss.* 1, 7.

A judgment debtor's household furniture having been seized at his house under a fi. fa., the debtor's father-in-law bought them from the sheriff's officer, and took his receipt for the purchase-money. The receipt contained an inventory of the furniture. On the same day the purchaser let the house and furniture to the debtor at a rent under a written agreement, and the debtor continued in possession of the house and furniture:—

Held, that the receipt did not require registration as a bill of sale under 17 & 18 Vict. c. 36, ss. 1, 7; since the sale was by the sheriff's officer and an absolute one, and the receipt was not the medium of transfer but only evidence of payment.

THIS was an interpleader issue tried before Pollock, B., in which the plaintiff affirmed and the defendant denied that certain household furniture seized by the sheriff of Surrey in 1878, under a writ of fi. fa, in execution of a judgment recovered by the defendant Godfrey against C. D. Watson, were the property of Woodgate as against Godfrey. Woodgate, who was the father-in-law of Watson the judgment debtor, claimed the goods under a purchase from the sheriff's officer in 1875. It appeared that the sheriff's officer having in 1875 seized the goods in question under a fi. fa., issued on a judgment obtained against C. D. Watson by one

(1) Leave to appeal was refused.

1879 — WOODGATE v. GODFREY.

Wood, sold them to Woodgate for 589*l.* 17*s.*, and gave him a receipt in the following terms:—

"In the Common Pleas. "51, Stamford Street,
"Blackfriars Road.
"31st May, 1875.

"Robert Wood . . . Plaintiff;
"Charles Dillon Watson . Defendant.

"Received of Mr. Thomas William Woodgate, of the Boundaries, Balham, Surrey, the sum of five hundred and eighty-nine pounds, seventeen shillings, being the value of the undermentioned goods, chattels, and effects, seized by the sheriff of Surrey in the above action, at 15, Altenburg Gardens, Lavender Hill, Battersea, in the county of Surrey, and sold to the said Thomas William Woodgate.

"£589 17*s.* (Signed) "H. Herrick & Son."

The receipt contained an inventory of the goods.

At the same time, Woodgate, by a written agreement bearing date the 31st of May, 1875, let the house, 15, Altenburg Gardens, together with the goods in question to Watson, on a quarterly tenancy at a rent of 112*l.* a year, and Watson continued in possession as before. Pollock, B., directed the jury that the receipt was not a bill of sale under the Bills of Sale Act, and did not require registration, and the jury found a verdict for the plaintiff Woodgate.

R. V. Williams, for the defendant, moved for a rule nisi for a new trial on the ground of misdirection. Sales by the sheriff's officer are clearly within the contemplation of the Bills of Sales Act, 17 & 18 Vict. c. 36, as shewn by the words of s. 1, "Or in case the same shall be made or given by any person under or in execution of any process, then a description of the residence or occupation of the person against whom such process shall have issued." The interpretation clause, s. 7, in defining bills of sale uses words large enough to include a receipt. (1) The saving

(1) Sect. 7: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels . . . . but shall not include the following documents, that is to say . . . . transfers of goods in the ordinary course of business of any trade or calling. . . ."

1879

WOODGATE v. GODFREY.

words in that section as to mercantile transactions prevent the application of the Act to the case of an ordinary sale in the way of business. The mischief aimed at by the Act was what happened in the present case, a sale by a debtor with an agreement that he shall remain in possession as the ostensible owner. If such a case is not within the Act a debtor need only get a friend to obtain judgment against him, buy the goods from the sheriff and let them again to the debtor. Such a receipt as the present was held to be "an assurance" within the Act by the Court of Appeal in *Ex parte Cooper In re Baum.* (1)

[COCKBURN, C.J. There the sale was by the debtor himself, and there was no sheriff's officer in the case.]

That makes no difference in respect of the mischief aimed at by the Act. In *Ex parte Odell In re Walden* (2), a similar receipt and an agreement executed at the same time to let the debtor remain in possession for a sum of money were held to be within the Act. Those cases have overruled or thrown doubt on *Allsopp* v. *Day.* (3) The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4, expressly includes "inventories of goods with receipt thereto attached, or receipt for purchase-moneys of goods and other assurances of personal chattels."

COCKBURN, C.J. I think there ought to be no rule. The argument if pushed to its logical conclusion comes to this, that in every instance of a sale out and out of goods where a receipt is given it is a bill of sale which must be registered under the Act. If we decided in accordance with that contention it would introduce into almost the whole range of commercial transactions a statutory enactment of a very onerous character. The Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1—and that is the only Act with which we have to do in the present case—enacts that "every bill of sale of personal chattels made . . . . either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale, or at any future time to seize or take possession of any property and effects com-

(1) 10 Ch. D. 313. (2) 10 Ch. D. 76.
(3) 7 H. & N. 457.

1879

WOODGATE v. GODFREY.

prised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to" shall be registered. That was to prevent the mischief which arises when a person, selling goods so as to pass the property in them but without the possession, retains the possession himself, and thereby deceives the world into supposing he is the owner, while in reality he has given the purchaser the right to seize them at any time. But that Act was not intended to apply to a case of an out and out sale by a sheriff's officer where the possession remains in the execution debtor. Sect. 7 of the Act on which reliance is placed has nothing to do with such a case, but applies to cases where the sale is not out and out. To hold that every sale of goods which is evidenced by a receipt must be registered would introduce an intolerable burden. The present was not a transaction where the sheriff had anything to do with the ulterior destination of the goods. If there had been any instrument shewing that the sheriff was a party to any fraudulent arrangement it might be different, but the sheriff merely sells in execution of his duty and gives a receipt. The receipt is not the medium of transfer. The sale would be just as good without a receipt. All that the sheriff gives it for is to furnish evidence of the payment. The receipt does not pass the property in the goods. I think therefore it is not within the Act. A contrary decision would be a very great hardship on purchasers, and would entail most mischievous consequences.

POLLOCK, B. I think there should be no rule. This was a sale out and out of goods so far as the sheriff was concerned. It is said the case ought to be within the statute because the goods were allowed to remain in the possession of the debtor. But that cannot alter the circumstances of the sale. The two cases relied on are distinguishable. In *Ex parte Odell* (1) the agreement and the receipt amounted together to a mortgage. In *Ex parte Cooper* (2) the receipt was given not by the sheriff but by the debtor himself.

Rule refused. (3)

Solicitor for defendant: *J. Wilson Heritage.*

(1) 10 Ch. D. 76.
(2) 10 Ch. D. 313.
(3) A rule nisi was subsequently granted by the Court of Appeal.

EX PARTE TERRAZ. 1878
Dec. 2, 3.

Extradition—Warrant—Sufficiency of Description of Offence—"Crimes against Bankruptcy Law"—Extradition Acts, 1870 (33 & 34 *Vict. c.* 52), *s.* 8, *and Schedule, and* 1873 (36 & 37 *Vict. c.* 60), *s.* 1, *and Schedule.*

By the Extradition Acts, 1870 and 1873, indictable offences under the laws for the time being in force in relation to bankruptcy may be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted, were "crimes against bankruptcy law." A warrant for the apprehension of a fugitive criminal by virtue of such treaty described the offence as "the commission of crimes against bankruptcy law" within the jurisdiction of the foreign power demanding the extradition:—

Held, that the description was sufficient, and that the warrant was good.

THIS was a rule for a writ of habeas corpus, directed to the keeper of the Middlesex House of Detention, to bring up the body of one Alexander Terraz with a view to his discharge from custody.

It appeared that on the 12th of November, 1878, a warrant was issued by the chief magistrate at the Bow Street Police Court on the sworn information of the chancellor of the Swiss consulate-general in London. The warrant stated that it had been shewn to the magistrate that Alexandre Terraz, late of Locle, was accused of "the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation," and directed that he should be apprehended and brought up to be further dealt with according to law.

The prisoner was apprehended on the 18th of November, and taken before the magistrate and remanded. While he was under remand, a rule nisi was obtained on his behalf calling on the Solicitor of the Treasury, and the keeper of the Middlesex House of Detention, to shew cause why a writ of habeas corpus should not issue to bring the prisoner before the Court, on the ground that the warrant did not sufficiently set forth the nature of the offence, and otherwise was not good.

Before the case was argued, the Home Secretary issued his order to the magistrate under the Extradition Act, 1870, s. 7, requiring him to issue a warrant to apprehend the prisoner for the crime of fraudulent bankruptcy. A second warrant was

1878

EX PARTE TERRAZ.

accordingly issued stating the offence of the accused to be "the commission of crimes by a bankrupt against bankruptcy laws, that is to say, for that he, having been adjudicated a bankrupt, unlawfully did not deliver up to the trustee administering his estate for the benefit of his creditors, or as he directed, all such part of his real and personal property as was in his custody or under his control and which he was required by law to deliver up within the jurisdiction of the Swiss Confederation."

The Extradition Act, 1870, enacts by s. 7, "A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody."

By s. 8, "A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

"1. By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

"2. By a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint, and such evidence, or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction."

Among the crimes enumerated in the schedule to this Act are "crimes by bankrupts against bankruptcy law."

By s. 1 of the Extradition Act, 1873, the former Act is to be

construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to the second Act, and among these is the following: "Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act." In the year 1874 an extradition treaty was concluded between her Majesty and the Swiss Confederation, and among the crimes for which extradition was to be granted were: "Crimes against bankruptcy law."

Dec. 2. *Sir J. Holker*, *A.G.*, and *C. Bowen*, for the Crown; and *H. D. Greene*, for the Swiss Government, shewed cause. The purpose of issuing the warrant is to apprehend the prisoner with a view to the investigation of the charge against him. For this purpose the particularity of a warrant of commitment is not necessary, but a general description is sufficient: at all events, this warrant uses the very words of the treaty.

Jervis's Act (11 & 12 Vict. c. 42), ss. 9, 10, provides that no objection shall be taken or allowed to the warrants of justices therein mentioned for any alleged defect therein in substance or form; but apart from that Act the prisoner is in custody under this warrant, and the Court will not discharge him: *Ex parte Scott* (1); *In re Tivnan* (2); Hale's Pleas of the Crown, vol. ii. p. 110; *Rex* v. *Marks* (3); *Ex parte Krans.* (4) [They then contended that even if the first warrant was insufficient, there was good ground for detaining the prisoner on the second warrant, and referred on this part of the case to *Re Tivnan* (2); *Re Charles Smith* (5); *Ex parte Cross* (6); *Ex parte Dauncey* (7); *Re Bull* (8); *Ex parte Phipps.* (9)]

Atherley Jones, contrà. Assuming Jervis's Act to apply, this warrant does not comply with the provision that it "should state shortly the offence on which it is founded." Here there is no offence disclosed, "crimes against the bankruptcy law" being only a general description of a class of offences, and not a description of

(1) 9 B. & C. 446.
(2) 5 B. & S. 645.
(3) 3 East, 157.
(4) 1 B. & C. 258.
(5) 3 H. & N. 227.
(6) 2 H. & N. 354; 26 L. J. (M.C.) 201.
(7) 8 Jur. 829.
(8) 15 L. J. (Q.B.) 235.
(9) 11 W. R. 730.

1878

EX PARTE TERRAZ.

a specific offence known to the law of England. The warrant must state the offence specifically, otherwise "it cannot appear whether it be within the jurisdiction of the justices, nor can it appear whether the party be bailable or not:" Hale, Pleas of the Crown, vol. ii. p. 111, citing 2 Co. Inst. pp. 52, 591: *Caudle* v. *Seymour*. (1) The warrant shews no crime, and is like a blank warrant, which is bad: Chitty, Criminal Law, vol. i. p. 110. [He also contended that the second warrant could not be set up in answer to this rule.] (2)

Cur. adv. vult.

Dec. 3. KELLY, C.B. The question in this case is whether the prisoner, who, under circumstances to which I may briefly allude, has been taken into custody, and in respect of whom an application has been made on behalf of the Swiss Government for his extradition, is lawfully in custody. I do not think it necessary to refer to more than one of the many cases cited, because it appears to me that the whole case turns upon the first warrant, that of the 12th of November, which is mentioned in the rule, to the effect of which I will now proceed to direct attention. It appears that the warrant runs thus: "That Alexandre Terraz, late of Locle, is accused of the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation." The question is whether that description of the offence or offences charged against the prisoner is sufficient within the meaning of the statutes relating to extradition, or whether it is too general in its terms in not specifying any particular offence. I entertain no doubt that it is sufficient, and that the magistrate was entitled on this warrant to remand the prisoner with a view to further inquiry, and the production of the evidence which might lead either to his discharge or to his being delivered to the agent of the Swiss Government. It is perfectly clear that a warrant must sufficiently indicate the crime or crimes alleged to have been committed by the person who is to be apprehended under it. Looking at the Act of 1870, we find in

(1) 1 Q. B. 889; 10 L. J. (M.C.) 130.

(2) The judgment of the Court as to the validity of the first warrant rendered a decision on the points raised as to the second warrant unnecessary.

1878

Ex parte Terraz.

the schedule a number of crimes specially enumerated, and they may be divided into two classes—those that can be described and specified in one or two words, and those which cannot be so described, and which it would be impossible to describe with legal certainty without entering into a lengthened definition. Of the first class are murder, manslaughter, forgery, false pretences, and the like. Then follow two descriptions, as to either of which there would be great uncertainty and difficulty in an attempt to express in legal language a complete definition of an offence coming within the words used. The first is "crimes by bankrupts against bankruptcy law;" the other "fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force." Now to define in legal language, and in terms which would amount to a complete description, any offence which might have been committed, and might come within either of these two classes, might be exceedingly difficult; and therefore the legislature seem to have authorized, by using general words, the general description of offences such as that with which the prisoner is charged as "crimes against bankruptcy law." I do not think that we ought to refer to or act upon the second warrant, except by way of illustration, in so far as it probably explains what is the actual charge made against the alleged criminal. From the second warrant it would seem that that charge is the not delivering up to the trustee of his estate the real or personal property which he was required by law to deliver up for the benefit of his creditors. Now to put that charge into legal language might be difficult for those who had occasion at very short notice to obtain a warrant for the apprehension of an alleged criminal, and who would necessarily be required to act with great celerity and promptitude. For this reason it seems to me the legislature has permitted this comprehensive mode of description, so as to enable the complainant to bring the offender by general words of warrant before the magistrate, with a view to determining whether there is evidence to justify his extradition. If there were any doubt in the matter it would, I think, be settled by the case of *Ex parte Krans* (1), which is decisive upon the question of the description

(1) 1 E. & C. 258.

1878

EX PARTE TERRAZ.

of the crime in a warrant which justifies, or claims to justify, imprisonment until further inquiry. The marginal note of that case is to this effect, "Where persons detained without any warrant on board one of his Majesty's ships of war on a charge of smuggling, and on suspicion of murder, were brought up on writs of habeas corpus, and it appeared by the return to those writs and to a certiorari which issued at the same time, that the prisoners might be guilty of the offences imputed to them, the Court refused to discharge them out of custody, and committed them to the custody of the marshal, in order that they might be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law." The language of Lord Tenterden is conclusive upon the point that, where in such a case there must be further inquiry which requires the continued imprisonment of the party charged, if a habeas corpus be obtained, he is not to be discharged, but should be remanded for the purpose of the further inquiry before a competent authority, in order that he may either be put upon his trial or discharged, according to the result of the inquiry. Dealing with this case as if the prisoner were before us on a writ of habeas corpus, the result would necessarily be, the warrant not being upon a conviction or judgment, but one merely authorizing apprehension and detention in prison until further inquiry, that he would be remanded in custody for the purpose of such further inquiry.

HUDDLESTON, B. With regard to the first point, I am entirely of the same opinion as my Lord. The question is, whether the warrant discloses a good ground for detaining the prisoner. Now, it is clear that it is a warrant for the safe custody of the party until the case can be properly inquired into. I make that observation because, throughout the current of authorities there is a distinction made between warrants for apprehension, warrants for safe custody, pending the investigation before the proper tribunal, warrants for safe custody where the party is imprisoned for the purposes of state, or for the protection of individuals, and warrants in execution. Warrants in execution are in the nature of convictions, and it has always been held that warrants of that class require considerable strictness, for the reason that when the

party is brought up on the habeas corpus, and is held under a warrant in execution, the Court can only judge by what appears in the warrant whether a crime has been committed, and whether the alleged criminal is properly held in custody. But warrants for apprehension are merely instruments not directed to the prisoner, but directed to the officer for his protection, and to enable him to take the person into custody either for the purpose of inquiry, or of holding him in custody while the inquiry is going on, or of keeping him in safe custody for some of the reasons I have mentioned. Now, doubtless the latter class of warrants, namely where the party is to be held in safe custody during a particular time, would seem to require more particularity than a warrant for apprehension; but there are clear authorities to shew that warrants for safe custody, even for public purposes, or for the protection of the public or individuals, may be in general terms. There is a case which illustrates this probably better than any other; I mean the case of *Rex* v. *Despard.* (1) A power was given by 38 Geo. 3, c. 36, for suspending the Habeas Corpus Act, and it was by that statute enacted that where a person should be imprisoned for high treason, suspicion of treason, or treasonable practices, or by warrant of any of her Majesty's principal secretaries of state for such causes as aforesaid (that is, high treason, suspicion of treason, or treasonable practices), he might be detained in custody until the 1st of February, 1799, that is to say, his right to be tried was to be suspended. In Despard's case, the Secretary of State's warrant committed Colonel Despard to custody under that statute, alleging generally "treasonable practices," and he was brought up on a habeas corpus. Mr. Fergusson who argued for the writ, contended that the Court should not act upon such an indefinite warrant, from which it did not appear whether the charge was for high treason, or petty treason, or suspicion of either, or whether it was for being accessory after the fact, or it might be for publishing a seditious libel, or drinking to the health of a traitor, or asserting the Pope's supremacy, or a variety of other acts. The Attorney General (Sir John Scott), in shewing cause, did not rely upon the Act of Geo. 3, as legalising warrants in any other form than was warranted by the common

1878

EX PARTE TERRAZ.

(1) 7 T. R. 736.

1878

EX PARTE TERRAZ.

law, but upon the fact that the warrant was perfectly good at common law, and he cited and referred to upwards of fifty precedents for warrants of this kind, and pointed out those in particular that were under the reign of William III., Queen Anne, George I., George II., and George III. The importance of that appears from the judgment of the Court, in which they admitted that those were authorities, and pointed out that, if any had been quoted under the reigns of Charles II. or James II., they would not have attached much importance to them; but as these warrants were issued at the time when, as Lord Kenyon observed, "the liberties of the subject were well understood and nobly asserted," and many of them too, as he further said, in the time of Lord Holt, "a man above all praise, and he was assisted by able judges, one of whom was Mr. Justice J. Powell, who fell little short of Lord Holt himself," the Court held them to be authorities shewing that at common law a commitment even for safe custody for political purposes, in contravention of the liberty of the subject, was perfectly good in describing the offence charged generally as "treasonable practices," which were the words used in 38 Geo. 3, c. 36. In the case of *Rex* v. *Gourlay* (1), where a person was held under a commitment very different from and requiring greater strictness than a commitment for investigation merely, a general form was again admitted, and Lord Tenterden, in delivering judgment, said: "It is not a commitment for safe custody, in order that the party may afterwards be brought to trial, nor is it a commitment in execution; but it is a commitment for safe custody in order to secure the party and prevent mischief to his Majesty's subjects. That being the object, I think the warrant ought not to receive the same strict construction as a warrant in execution;" and he concludes his judgment by saying, "Upon the whole, I think that the warrant, not being a warrant of commitment in execution, is sufficiently certain, and that the prisoner must be remanded."

Both these cases are authorities to shew that, even in warrants for safe custody, a general assertion or a general charge is sufficient. Now, the present is a warrant for the apprehension of the party, and issued under the provisions of the Extradition Act,

(1) 7 B. & C. 669.

1878

EX PARTE TERRAZ.

1870, which mentions "extradition crimes." By the interpretation clause (s. 26), an "extradition crime" is defined to mean "a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act." Amongst those crimes are mentioned, "crimes by bankrupts against bankruptcy law." I concede that, the description in the first warrant being "crimes against bankruptcy law," had the first warrant been framed under the Act of 1870 alone, it would have been insufficient, because that Act only applies to crimes committed by bankrupts against bankruptcy law; but the Extradition Act, 1873, enlarges that description to "any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the Act of 1870." Therefore "crimes by bankrupts against bankruptcy law" must now be read as "crimes against bankruptcy law." That is the general term. What, then, appears in the first warrant? That this man is charged with "crimes against bankruptcy law," and therefore in following the exact words of what must now be considered the amended schedule of the Act of 1870, it is obvious that all that is necessary has been done.

The treaty itself between this country and Switzerland, in 1874, in the 10th article, provides that the requisition for extradition may be made by means of the post or by telegraph. The magistrate receives information that something has been done which is an extradition crime, and he states that in his warrant in the very terms of the information which he has received, and when the matter is brought before him, and he proceeds to an investigation of the whole case, no doubt it must be shewn that he has jurisdiction to deal with the accused on a charge of committing an extradition crime, but no habeas corpus would be granted to discharge the prisoner out of custody while that investigation is pending; and the cases referred to by Mr. Greene of *Rex* v. *Marks* (1), and *Rex* v. *Krans* (2), are authorities confirming that view. Every protection is obviously given by the Extradition Act to persons taken up under its provisions. Everything in the nature of a political crime is expressly excluded, and no man can be apprehended for an extradition crime as a cloak under

(1) 3 East, 157. (2) 1 B. & C. 258.

1878

EX PARTE TERRAZ.

which he may be convicted of a political one (s. 3, sub-s. 1). The Act also provides (s. 11), that, upon the magistrate committing the alleged criminal to prison, he shall inform him that he has a right to a habeas corpus, and that the extradition warrant for sending him out of this country to the foreign state will be suspended for fifteen days in order to enable him, if he chooses to do so, to apply for a writ of habeas corpus and have the question decided, when, if it turns out that the crime charged is not within the treaty or the Act, he will be discharged. It is moreover provided by the 3rd section (sub-s. 2) that a fugitive criminal shall not be detained or tried in the foreign state to which he may have been surrendered, for any offence committed prior to his surrender, other than the extradition crime upon which the surrender is grounded, until he has been restored or had an opportunity of returning to her Majesty's dominions. Every possible protection therefore is given to a prisoner under this statute, and when I consider that, when I look to authority, and when I see what the nature of this warrant is, I feel perfectly satisfied that a warrant for apprehension in the general terms of the present one is a perfectly good and valid warrant, and that the prisoner under it cannot be discharged.

Rule discharged.

Solicitor for prisoner: *Merriman.*
Solicitor for Crown: *Solicitor to the Treasury.*
Solicitors for Swiss Government: *Freshfields & Williams.*

GREAVES *v.* KEENE.

1879
Feb. 20.

Gaoler—Discharge of Prisoner in Custody for Contempt—Default by Solicitor in payment of Sum of Money as Officer of Court—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

The Debtors Act, 1869, s. 4, enacts that "no person shall be arrested or imprisoned for making default in payment of a sum of money," except (inter alia) in case of "default by an attorney or solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order," and provides that "no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year."

In an action in which the present plaintiff acted as solicitor and improperly signed judgment and issued execution and received the amount of the levy, an order was made on him to bring that amount into court, and on his non-compliance an order of attachment was made under which he was arrested and committed to the custody of the defendant. The order was to attach the plaintiff so as to have him before the Common Pleas Division of the High Court of Justice to answer touching an alleged contempt, but the order did not shew what the contempt was. The plaintiff was kept in custody for more than a year, and then applied for and obtained his discharge under a judge's order. In an action by him against the defendant for detaining him beyond the year:—

Held, that whether the Debtors Act, 1869, s. 4, applied or not, the defendant having complied with the order was not liable to an action, but was protected by the exigency of the writ.

Moone v. *Rose* (Law Rep. 4 Q. B. 486), distinguished.

THIS was an action brought against the Governor of the Surrey County Gaol for wrongfully detaining the plaintiff in custody.

At the trial before Pollock, B., at Westminster at the Michaelmas Sittings, 1878, the learned judge nonsuited the plaintiff on the opening of counsel. The facts, as they appeared by the pleadings or were admitted on the argument, were as follows:—

The plaintiff acted as solicitor for one Ruddock in an action *Ruddock* v. *Lake*, and on the 8th of March, 1876, signed judgment and issued execution. The Sheriff of Middlesex subsequently paid over to the present plaintiff the amount of the levy, namely 100*l*. On the application of the defendant Lake, the judgment so entered was set aside as having been improperly signed, the subsequent proceedings were stayed, and the money so paid by the sheriff was ordered to be brought into court by the plaintiff forthwith. This order was not complied with, and on the 23rd of March of the same year an order was made that a writ of attach-

1879

GREAVES v. KEENE.

ment should issue against the plaintiff for his neglect and refusal to obey the order to pay the money into court. On the 5th of May an order was made that a writ of attachment might issue in the county of Surrey. The order ran thus: "We command you to attach Albert Greaves so as to have him before us in the Common Pleas Division of our High Court of Justice, wheresoever the said Court shall then be, there to answer us as well touching a contempt which he it is alleged hath committed against us, as also all such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf."

The plaintiff was arrested on the 12th of August, 1876, and on the same day committed by the sheriff to the custody of the defendant. He remained in custody for a year, but on the 10th of August, 1877, he gave notice in writing to the defendant that he claimed to be discharged on the following day. The defendant did not act on this notice, and the plaintiff applied to a judge and obtained an order for his discharge, and was accordingly discharged on the 16th of August. The claim in the action was in respect of the detention from the 12th to the 16th of August.

A rule having been obtained to set aside the non-suit,

C. S. Bowen, and *Lyon*, shewed cause. The Debtors Act, 1869, s. 4 (1), forbids imprisonment for debt for more than a year in the case of a solicitor ordered to pay a sum of money in his character as an officer of the court. This does not apply to the case of payment into court, and further the plaintiff was committed for the contempt, and so his case does not come within the section

(1) 32 & 33 Vict. c. 62, s. 4: "With the exception hereinafter mentioned no person shall, after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment. . . . (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order. . . . Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money."

at all. But, even if it did, the defendant is protected by the warrant. He has no right to go behind it, while it stands he is bound to obey it and is protected.

Gibbons, and *Pym Yeatman*, for the plaintiff. There can be no difference between the cases of payment to a creditor and payment into court, in either case the order is made on the solicitor as an officer of the court, and is within the fourth exception. The contempt of Court is the non-payment of the money, and the gaoler must read the warrant by the light of the statute: *Moone* v. *Rose*. (1)

KELLY, C.B. I should be glad if the legislature had pronounced how long, in the case of an officer of the court committed for disobedience to an order or other contempt, his imprisonment is to last, but no such law exists. The warrant in this case is in a well-known and usual form, and it must be obeyed by the officer to whom it is directed according to its exigency. Now the warrant commands that the plaintiff should be detained, so that he may be brought before the Common Pleas Division of the High Court of Justice, and until that takes place the prisoner has no claim to be discharged. Independently of this I go perhaps further than my learned Brother did at the trial, or than is perhaps strictly necessary for the decision of this case, for I think that, whether a time for the imprisonment were limited or not, the officer is not bound to inquire what statute is violated. All that he has notice of here is that the plaintiff is committed for contempt, but of what contempt the defendant has no notice, but he is required to keep the person in contempt until directed to bring him before the Common Pleas Division. This he has done, and he is not liable for so doing. Our judgment must be for the defendant.

POLLOCK, B. It seems to me unnecessary to express any opinion on the Debtors Act, 1869. For the decision of this case it is sufficient to say that the defendant, in obedience to his duty under a warrant of the Court, detained the plaintiff. The defendant is not by that warrant ordered to keep the plaintiff for any

(1) Law Rep. 4 Q. B. 486.

1879

GREAVES v. KEENE.

particular time or for any particular offence. The attachment is of a quasi-criminal character, and the only mode in which the defendant can obey it is by keeping the body of the plaintiff until the further order of the Court. Thus it is a different case from that in which the time of detention is expressed in the margin of the warrant, or may be gathered from it as in *Moone* v. *Rose* (1), in which case at the expiration of the time the gaoler ought to discharge his prisoner without further order.

Rule discharged.

Solicitor for plaintiff: *W. F. Morris.*

Solicitor for defendant: *Smallpiece, for Smallpiece & Sons, Guildford.*

Feb. 25.

BOX *v.* JUBB AND ANOTHER.

Water stored—Overflow from Defendants' to Plaintiff's Land—Vis Major.

The defendants possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and so cause an overflow thence on to the plaintiff's land. In an action for damage caused thereby it was shewn that the defendants had no control over the main drain, or the other reservoir, or knowledge of the circumstances which caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances:—

Held, that the defendants were not liable.

CASE stated in an action brought in the county court of Yorkshire holden at Bradford to recover damages by reason of the overflowing of a reservoir of the defendants.

1. The defendants are the owners and occupiers of a woollen cloth mill situate at Batley, in the county of York, and for the necessary supply of water to the mill is a reservoir, also belonging to the defendants. Such mill and reservoir have been built, and constructed, and used as at the time of the overflowing of the reservoir hereinafter mentioned, for many years.

2. The plaintiff is the tenant of premises adjoining the reservoir.

(1) Law Rep. 4 Q. B. 486.

3. The reservoir is supplied with water from a main drain or watercourse. The surplus water from the reservoir passes through an outlet into the main drain or watercourse. The inlet and outlet are furnished with proper doors or sluices, so as (when required) to close the communications between the reservoir and the main drain or watercourse.

4. The whole of the premises are within the borough of Batley, and the defendants have the right to use the main drain or watercourse by obtaining a supply of water therefrom and discharging their surplus water thereinto, as hereinbefore stated, but have otherwise no control over the drain or watercourse, which does not belong to them.

5. In the month of December, 1877, the plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir.

6. Such overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the main drain or watercourse at a point considerably above the defendants' premises, and by an obstruction in the main drain or watercourse below the outlet of the defendants' reservoir, whereby the water from such main drain or watercourse was forced through the doors or sluices (which were closed at the time) into the defendants' reservoir.

7. Such obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction the overflowing of the reservoir would not have happened.

8. The defendants' reservoir, and the communications between it and the main drain or watercourse, and the doors or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances.

9. No negligence or wrongful act is attributable to either party.

Under the circumstances the judge of the county court was of opinion that the defendants were liable for the damage sustained by the plaintiff, and accordingly gave judgment for the plaintiff.

The question for the opinion of the Court, having regard to the facts set out in the case, was whether the defendants were liable

1879

Box v. Jubb.

for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding being caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on defendants' part, the overflowing of the defendants' reservoir being occasioned by the act of a third party, over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, and the direct cause of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control and without their knowledge.

Gully, Q.C. (*George C. Thompson*, with him), for the defendants. The principle on which *Rylands* v. *Fletcher* (1) was decided is to be found in the quotation from the judgment of Blackburn, J., at p. 339. This case is clearly distinguishable. [He was then stopped.]

Bray, for the plaintiff. The defendants are liable as if they had themselves constructed this reservoir. What they have done is to make artificial works which if they overflow may injure their neighbour. They ought to have provided for this by making the sluices and gates so secure as to withstand any pressure the drain would stand. Had this been done they would not have been liable, but they have chosen to make a hole in the drain which if untouched would not have overflown the plaintiff's premises. Having done so, they must do it in such a way that the former security may continue, and the onus is on them to shew that this is the case. [*Nicholls* v. *Marsland* (2) and *Carstairs* v. *Taylor* (3) were referred to.]

Gully, Q.C., was not called on to reply.

Kelly, C.B. I think this judgment must be reversed. The case states that for many years the defendants have been possessed of a reservoir to which there are gates or sluices. There has been an overflow from the reservoir which has caused damage to the plaintiff. The question is, what was the cause of this overflow?

(1) Law Rep. 3 H. L. 330. (2) Law Rep. 10 Ex. 255.
(3) Law Rep. 6 Ex. 217.

Was it anything for which the defendants are responsible—did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants.

POLLOCK, B. I also think the defendants are entitled to judgment. Looking at the facts stated, that the defendants had no control over the main drain, and no knowledge of or control over the obstruction, apart from the cases, what wrong have the defendants done for which they should be held liable? The case of *Rylands* v. *Fletcher* (1) is quite distinguishable. The case of *Nichols* v. *Marsland* (2) is more in point. The illustrations put in that case clearly go to shew that if the person who has collected the water has done all that skill and judgment can do he is not liable for damage by acts over which he has no control. In the judgment of the Court of Appeal (3) Mellish, L.J., adopts the principle laid down by this Court. He says: "If indeed the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher* (1) establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and

(1) Law Rep. 3 H. L. 330. (2) Law Rep. 10 Ex. 255.
(3) 2 Ex. D. 1, at p. 5.

1879

Box v. Jubb.

added to that which was properly and safely there. For this the defendants, in my opinion, both on principle and authority, cannot be held liable.

Judgment for the defendants. (1)

Solicitors for plaintiff: *Torr & Co., for S. Wooler, Batley.*

Solicitors for defendants: *Layton & Jaques, for Scholefield & Taylor, Batley.*

March 20.

DENNIS *v.* SEYMOUR.

Practice—Specially Indorsed Writ—Leave to Defend as to Part of Claim where Writ specially Indorsed—Order XIV., rule 4.

When upon shewing cause against an application for leave to sign final judgment under Order XIV., the defendant's affidavit admits part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power under rule 4 to require the defendant to pay to the plaintiff the amount admitted to be due as a condition of being allowed to defend as to the residue. The proper order is that the plaintiff have judgment for the amount admitted; the defendant to be at liberty to defend as to the residue.

WRIT specially indorsed for 70*l.* 16*s.* for goods sold and hired and for the rent of a furnished house. The plaintiff having taken out a summons under Order XIV., rule 1, upon an affidavit that the defendant was indebted in the amount claimed and had no defence, the defendant made an affidavit admitting that 41*l.* 6*s.* of the claim was due, and alleging that he was and had always been willing to pay that amount. As to the residue, 29*l.* 10*s.*, the affidavit disclosed a defence on the merits. The master made an order that the defendant should pay the plaintiff within a week 41*l.* 6*s.*, and that in default the plaintiff should be at liberty to sign judgment for the amount claimed on the writ with costs; and that if the 41*l.* 6*s.* were paid as aforesaid the defendant should be at liberty to defend the action as to the residue.

The defendant having appealed, Lopes, J., refused to vary the order.

E. H. Palmer, for the defendant, moved to vary the order.

Vesey Fitz Gerald, for the plaintiff.

(1) Leave to appeal was refused.

1879

DENNIS v. SEYMOUR.

PER CURIAM (Kelly, C.B., and Hawkins, J.) Under Order XIV., rule 4 (1), there is no power to require the defendant to pay to the plaintiff the amount admitted to be due as a condition of being allowed to defend as to the residue. The order must be varied thus: the plaintiff to have judgment for 41*l.* 6*s.*, the amount admitted to be due; the defendant to have leave to defend as to the residue.

Solicitor for plaintiff: *H. Luxton.*
Solicitor for defendant: *Durant.*

DAVEY *v.* SHANNON.

March 31.

Contract not to be performed within a Year—Statute of Frauds, s. 4.

The statement of claim alleged that in 1866, the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within five miles of D.; and that on the expiration of the three years he continued in the plaintiff's employment on the like terms (except as to the period of employment) till 1877. Breach that in 1877, the defendant left the plaintiff, and carried on business as a tailor in D. The statement of defence alleged that the contract was not in writing as required by the Statute of Frauds:—

Held, on demurrer, by Hawkins, J., that the contract amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff; and was therefore primâ facie not to be performed within a year, and therefore fell within s. 4 of the Statute of Frauds.

DEMURRER to part of a defence.

The statement of claim alleged as follows:—

1. The plaintiff is an outfitter and tailor carrying on business in Fore Street, Devonport.

2. In or about October, 1866, the defendant entered into the

(1) Order XIV., rule 4: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."

1879

DAVEY v. SHANNON.

employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter, within five miles of Devonport.

3. The defendant on the expiration of the said period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of October, 1877.

4. At or about the end of October, 1877, the defendant left the plaintiff's employment, and shortly afterwards began to carry on business as a tailor and outfitter, in Fore Street, Devonport, being the same street in which the plaintiff carries on his said business, and he has since continued, and still continues to carry on such business at the place aforesaid, contrary to the provisions of his said contract, whereby the plaintiff has been injured, &c.

The statement of defence alleged in paragraph 4, "that neither the alleged contract nor any memorandum or note thereof was or is in writing signed by the defendant or any other person by him lawfully authorized, and the defendant relies on the statute commonly known as the Statute of Frauds, as affording a defence to this action on the ground that the alleged contract was an agreement not to be performed within the space of one year from the making thereof."

The plaintiff demurred to this paragraph.

March 24. *Anstie*, for the plaintiff, was stopped.

Arthur Charles, Q.C. (*Ringwood*, with him), for the defendant. This is an engagement for an indefinite term and therefore primâ facie for so long as the defendant's life should last. Therefore it is for more than a year, and is an "agreement that is not to be performed within the space of one year from the making thereof," within s. 4 of the Statute of Frauds: *Eley* v. *Positive, &c., Assurance Company*, per Kelly, C.B., Cleasby and Amphlett, B.B. (1) This ground of decision was not touched by the Court of Appeal, who confirmed the decision on the ground that there was no contract at all. (2) The fact of the engagement being defeasible

(1) 1 Ex. D. 20. (2) 1 Ex. D. 88.

within the year by death, misconduct, notice, or otherwise, does not take it out of the the statute: *Dobson* v. *Collis*, per Alderson, B. (1); *Roberts* v. *Tucker*. (2) *Knowlman* v. *Bluett* (3) does not touch the present question. It never could have been intended that this defendant should be bound for one year only.

Anstie, in reply. The cases on defeasance of the agreement within the year have no application to the present, which is governed by an unbroken series of decisions—see notes to *Peter* v. *Compton* (4); which establish that the statute means an agreement which the parties intended should not be, or which from its terms is incapable of being, performed within the year: as to pay an annuity: *Sweet* v. *Lee* (5); or to publish annual numbers of Shakespeare: *Boydell* v. *Drummond* (6); or to maintain a child of five years till she should be able to support herself: *Farrington* v. *Donohoe* (7); and does not extend to cases where the thing may be performed within the year, as a promise to leave money by will: *Fenton* v. *Emblers* (8), where Denison, J., said, "A contingency is not within it, nor any case that depends on contingency:" *Ridley* v. *Ridley* (9); or that the executor shall pay money: *Wells* v. *Horton* (10); or to pay "one guinea a day so long as Napoleon Bonaparte should live:" *Gilbert* v. *Sykes* (11); or to maintain a child so long as the defendant should think proper: *South* v. *Strawbridge* (12); or to maintain a person during his life. In *Murphy* v. *O'Sullivan* (13), it was held by the Queen's Bench and also by the Court of Error, that "an agreement to maintain a young person during his life" was not within the statute, see per Monahan, C.J., in *Farrington* v. *Donohoe*. (14) There is no presumption at all in law as to the length of future life, and this was the ground of both those Irish decisions. There is no distinction in principle between the cases of continuous performance and the present one of continuous non-performance of

(1) 1 H. & N. 81, 83; 25 L. J. (Ex.) 267, 268.
(2) 3 Ex. 632.
(3) Law Rep. 9 Ex. 1, 307.
(4) 1 Sm. L. C. 5th ed. 283.
(5) 3 Man. & G. 452.
(6) 11 East, 142.
(7) Ir. Rep. 1 C. L. 675.
(8) 3 Burr. 1278, 1281.
(9) 34 L. J. (Ch.) 462, per Romilly, M.R.
(10) 4 Bing. 40.
(11) 16 East, at pp. 152, 154.
(12) 2 C. B. 808.
(13) 11 Ir. Jur. (N.S.) 111.
(14) Ir. Rep. 1 C. L. at p. 679.

1879

DAVEY v. SHANNON.

some act. To this series of authorities there is only one exception, *Eley* v. *Positive, &c. Assurance Company* (1), where those authorities were not cited, and where it was unnecessary to decide the question, because in the Court below and in the Court of Appeal, it was held there was no consideration moving from the plaintiff and therefore no contract at all.

[*Charles, Q.C.*, pointed out that the judgment of the Chief Baron rested on the Statute of Frauds alone.]

Cur. adv. vult.

March 31. HAWKINS, J. The question raised by this demurrer is whether the contracts set forth in the 2nd and 3rd paragraphs of the statement of claim fall within the 4th section of the Statute of Frauds. The 2nd paragraph alleges that "in or about the month of October, 1866, the defendant entered into the employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter within five miles of Devonport." The 3rd paragraph alleged that "the defendant, on the expiration of the first period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of October, 1877." The breach alleged was, that having at the end of October, 1877, left the plaintiff's employment, he did set up in business, &c.

I am of opinion that the contracts fall within the 4th section of the Statute of Frauds as agreements not to be performed within the space of one year from the making thereof. Upon the first contract for three years it is impossible to raise a doubt. The case, however, has been argued as though it rested upon a new contract of employment for an indefinite period after the expiration of the three years, and an agreement on defendant's part never after that employment should cease to set up business as a tailor or outfitter within five miles of Devonport. As thus presented I have considered the case. The law upon the subject is now well established. A contract which according to its terms is primâ

(1) 1 Ex. D. 20, 88.

facie not to be performed within a year, is not the less within the statute because it is made defeasible by a contingency which may occur within that period. Thus a contract of service for two years is none the less within the statute because it is made terminable by the death of either of the parties, or by notice, or by the misconduct of the servant, at any period of the service. *Dobson* v. *Collis* (1) is an express authority to this effect. *Roberts* v. *Tucker* (2) is a striking authority in support of the same doctrine. That was an action by a stipendiary curate against the incumbent of a parish, founded upon an alleged promise made by the defendant to the plaintiff to take all necessary measures for obtaining the payment of an *annual* grant from the Society for Promoting the Employment of Additional Curates in *each* and every year, &c. At the trial before Coltman, J., he nonsuited the plaintiff upon the ground that the contract fell within the 4th section of the Statute of Frauds. On motion to set aside that nonsuit, Parke, B., and Alderson, B., upheld that ruling, the latter saying, "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not for that reason taken out of the operation of the Statute of Frauds."

Sweet v. *Lee* (3) further illustrates the same now well-recognised proposition. There the contract was for an annuity for life, and the Court held it to be within the 4th section, though it *might*, by the death of the annuitant, be terminated at any time. Upon the same principle in *Farrington* v. *Donohoe* (4) it was decided that a verbal agreement to maintain a child aged five years till she was able to do for herself, was within the statute, although the child might die within a year, for it was clear that if she lived the contract was not to be, i.e., could not be in the contemplation of anybody performed within that period. The same view was taken by this Court in *Eley* v. *Positive, &c., Assurance Company* (5), where it was held that the engagement of the plaintiff as solicitor to the company during his whole professional life, and so long as the defendants continued a company, was a contract

(1) 1 H. & N. 81; 25 L. J. (Ex.) 267.
(2) 3 Ex. 632.
(3) 3 M. & G. 452.
(4) Ir. Rep. 1 C. L. 675.
(5) 1 Ex. D. 20.

1879

DAVEY v. SHANNON.

not to be performed within a year, though it *might* be determined by the death or resignation of the plaintiff himself, or by his dismissal for misconduct, within that period.

On the other hand a contract which primâ facie and from its terms may be performed within a year, however improbable that it will be so, and even though the parties to it at the time of making it expected its endurance beyond that period, does not fall within the statute, and it is immaterial that the performance of it is, by the natural course of events, delayed for a much longer period. The most familiar illustration of this proposition is the case of a servant hired generally, whose service may be determined by reasonable notice at any time. Such a contract does not fall within the operation of the statute, though the service may continue and the contract remain unterminated for many years: *Beeston* v. *Collyer*. (1)

Fenton v. *Emblers* (2) well illustrates the law in this respect. That was an action brought by the plaintiff against the executor of a person named May, upon a promise of May by his last will and testament to give and bequeath to the plaintiff a legacy or annuity of 16*l*. by the year, to be paid and payable to her yearly and every year from the day of the decease of the said May, for and during the term of her natural life. It was objected that this agreement was within the 4th section of the statute, and ought to have been in writing, for that it was not to be performed within a year, since a whole year from May's death was to elapse before the annuity would become payable. It was answered, however, that the action was brought for May's not having done what he ought to have done in his lifetime, viz., make his will, which might have been done within the year. Denison, J., said the statute does not extend to cases where the thing *may* be performed within the year; and Wilmot, J., said, "The statute only extends to such promises when by the express appointment of the party the thing is *not* to be performed within a year:" see also *Ridley* v. *Ridley*. (3)

Souch v. *Strawbridge* (4) was an action for the maintenance of a child placed by the defendant in 1842 under the care of the

(1) 4 Bing. 309.
(2) 3 Burr. 1278.
(3) 34 L. J. (Ch.) 462.
(4) 2 C. B. 808.

plaintiff, upon an agreement by the defendant to pay 5*s.* per week or one guinea per month, until the defendant gave notice, or as long as the defendant should think proper. The child remained with the plaintiff till 1845. The Court of Common Pleas held that the case was not within the statute, for there was no certain time fixed for the duration of the contract, but it was to endure for an indefinite period, subject to be put an end to at any time at the option of the defendant, and that contingency might defeat the contract within a year.

Upon the same principle *Knowlman* v. *Bluett* (1) was decided in this Court. There the contract was that the plaintiff should take charge of the seven illegitimate children of which the defendant was the father, and that the defendant should give her 300*l.* a year, payable quarterly, to keep them. The Court held the case not to be within the statute, for the reason given by Bramwell, B., namely, that "the sum may be called an annuity, but really the engagement was not binding on either party for any definite space of time," and that the defendant might at the end of any quarter have refused to provide for the maintenance of the children any longer, and in like manner the plaintiff might have declined to continue to take charge of them. The contract *might* have been performed within the year, though no doubt both parties *expected* it would last longer. This judgment was appealed against (2), but the appeal was disposed of upon another ground.

In the case now before me, the contract set out in the statement of claim amounts to an agreement on the defendant's part not to set up the trade of a tailor or outfitter within five miles of Devonport during the joint lives of himself and the plaintiff. Primâ facie, therefore, it was not to be performed within a year, and therefore fell within the operation of the 4th section of the Statute of Frauds. My judgment, therefore, is for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Crowder, Anstie, & Vizard, for T. C. Brian, Plymouth.*

Solicitors for defendant: *Gush & Phillips, for J. P. Pearse, Plymouth.*

(1) Law Rep. 9 Ex. 1.

(2) Law Rep. 9 Ex. 307.

1879
April 1.

COOPER *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Deposit of Money under Contract—Forfeiture of Deposit—Performance of Contract Condition precedent to Right to recover Deposit.

The plaintiff bought from the defendant company a season ticket entitling him to travel by their railway for one month, paying the usual charge for such a ticket, and 10*s.* deposit, and agreed to be bound by certain conditions. The 4th condition was that the ticket "is to be considered as the property of the company to be delivered up at the secretary's office on the day after expiry or on forfeiture." The 6th condition was "That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company, if it shall be lost, or in case of any breach of any of the above conditions." Some few days after the expiry of the month, but within a reasonable time, the plaintiff delivered up the ticket and claimed the deposit; and on the company's refusal brought an action to recover it:—

Held, that the performance of every one of the conditions was a condition precedent to the right to a return of the deposit; and that as the ticket had not been delivered up "on the day after expiry" the conditions had not been performed, the deposit was forfeited, and the plaintiff could not maintain the action.

CASE on appeal from the City of London Court.

1. This is an action which was commenced in the City of London Court to recover the sum of 10*s.*, deposited by the plaintiff with the defendants under the circumstances hereinafter mentioned.

2. On or about the 30th day of September, 1876, the plaintiff applied at the season ticket office of the defendants for one of their season tickets, to entitle him to travel for one month to and fro between London and Brighton. He thereupon signed a memorandum agreeing, as the holder of his then present or any future main line season ticket, to abide by and conform to the following conditions:—

"Conditions upon which Main Line Season Tickets are issued and accepted.

"1. That it is to be used subject to and in conformity with the company's bye-laws, rules, regulations, and time-tables from time to time in force.

"2. That it is available only at and between the two stations named thereon, including intermediate stations, but no other.

"3. That it is not to be transferred to or used by any person other than the person named thereon, and who has signed these conditions.

"4. That on every demand it is to be shewn to any officer or servant of the company, and *that it is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry, or on forfeiture.*

"5. That the company are not to be liable for any stoppage, hindrance, or delay in respect to the starting, speed, or arrival of the train, whether arising from any accident, negligence, or other cause.

"6. *That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company, if it shall be lost, or in case of any breach of any of the above conditions.*

"7. If the holder wishes to perform any other journey than than that for which the ticket is available, he must, before starting, pay the excess or other proper fare and take a ticket as an ordinary passenger, failing which he must pay the full fare from the point of starting."

3. The plaintiff at the same time paid to the defendants the usual charge for the season ticket and also the usual deposit of 10*s.* thereon.

4. The season ticket applied for by the plaintiff was then filled up and handed to him by the defendants. On the back thereof was indorsed a copy of the aforesaid conditions with the words, "I agree to the above" signed by the plaintiff.

At the foot of the indorsement below the plaintiff's signature there is also the following note on the ticket:—

"In the event of this ticket being lost a reward of 10*s.* will be given to any person who brings it to the secretary, London Bridge station."

5. At the expiration of the month for which the season ticket was available the plaintiff returned the same to the defendants, and upon the same conditions obtained from the defendants another similar season ticket indorsed and signed as before.

6. It is the practice of the defendants, and, as a fact, the defendants, on or about the 24th day of November, 1876, sent by

1879

COOPER v. LONDON AND BRIGHTON RAILWAY CO.

post to the plaintiff a printed notice reminding him that the time for using the said season ticket would expire on a day therein mentioned, and that if he did not wish to renew it, he ought to return it immediately upon expiry, in order that the deposit might not be forfeited according to the condition indorsed thereon.

7. The said season ticket was returned to the defendants as stated by the plaintiff "some few days" after its expiration, the plaintiff at the same time requesting the return of the 10*s.* deposit, which was refused by the defendants, on the ground that the ticket was not returned on the "day after expiry," as required by the conditions. The Court found as a fact that the said ticket was returned within a reasonable time in that behalf.

8. The action was tried on the 15th day of October, 1878, when the Court gave judgment for the plaintiff, but, at the request of the defendants, gave them leave to appeal on the terms of their paying the costs of the appeal.

9. The question for the Divisional Court is whether or not under the circumstances aforesaid the plaintiff is entitled to recover.

March 28; April 1. *Jeune* (*Moseley*, with him), for the defendants. The only questions are, what is the contract, and has the plaintiff performed his part? No question arises whether the contract was reasonable or not. The company require the return of the ticket on the very day after its expiry, to prevent the numerous frauds practised upon them by the abuse of season tickets. The question whether a sum named is intended as a penalty or liquidated damages does not arise in the case of a deposit and a clause of forfeiture; even where, instead of a deposit of money, an I. O. U. is given: *Hinton* v. *Sparkes*. (1) Such a question arises only where the party insisting on the forfeiture has to sue. Here the company need not sue, they simply keep the deposit. The 8 & 9 Wm. 3, c. 11, only applies to persons suing for a penal sum.

C. H. Anderson (*A. M. Bremner*, with him), for the plaintiff. *Hinton* v. *Sparkes* (1) did not lay down any such rule as that

(1) Law Rep. 3 C. P. 161.

suggested. Whatever expressions to that effect are to be found in the judgment are contrary to the well-established rule, and must be considered overruled by the Court of Appeal in *In re Dagenham Dock Co., Ex parte Hulse* (1), where the Court relieved against a clause for forfeiture of a deposit of part of the purchase-money, default having been made in payment of the residue on the day named. The forfeiture of the 10*s.* being provided for the breach of many very different conditions, and the use of the word "forfeited" in the 6th condition, shew that the 10*s.* is to be regarded as a penalty and not as liquidated damages, per Bramwell, B., in *Betts* v. *Burch* (2); *In re Newman, Ex parte Capper.* (3) In such a case equity will relieve: Story, Eq. Jur. § 1314; Dart. Vend. p. 305. Then being a penalty the company can only retain as much of the deposit as represents their actual damage. Here they shew none and have no counter-claim. The return of the ticket on the very day after expiry is not a condition precedent to a right to sue for the deposit, because the stipulation for the return does not go to the root of the matter, but only partially affects it, and may be compensated for in damages: per Blackburn, J., in *Bettini* v. *Gye* (4); *Woolfe* v. *Horne.* (5)

Jeune, in reply. No claim for relief in equity is shewn on the case. If parties choose to make such a contract they are bound by it: *Lea* v. *Whitaker* (6); *London Tramways Co.* v. *Bailey.* (7)

KELLY, C.B. This case involves the determination of a question of little importance to the plaintiff, but of which it is difficult to exaggerate the importance to the defendants in their extensive operations. I think the matter when looked at is perfectly clear. The plaintiff bought a monthly season ticket from the defendants. We do not know the price, but the plaintiff deposited 10*s.* and agreed with the defendants upon certain conditions. The third condition is such that if broken great frauds may obviously be practised upon the company, by a ticket holder lending his ticket to a friend or otherwise transferring it. Then comes the fourth

(1) Law Rep. 8 Ch. 1022.
(2) 4 H. & N. 506, 510; 28 L. J. (Ex.) 267, 270.
(3) 4 Ch. D. 724.
(4) 1 Q. B. D. 183, 188.
(5) 2 Q. B. D. 355.
(6) Law Rep. 8 C. P. 70.
(7) 3 Q. B. D. 217.

1879

COOPER v. LONDON AND BRIGHTON RAILWAY CO.

condition which the plaintiff's counsel says ought to be read as if the words "on the day after expiry" were struck out and the words "within a reasonable time after expiry" were substituted for them, so that the condition would run "the ticket is to be considered as the property of the company, to be delivered up at the secretary's office within a reasonable time after expiry, or on forfeiture." But what is "a reasonable time," and who is to determine what is reasonable? It would vary in each case according to the circumstances. Such an alteration of the words would be to make a new contract for the parties which they did not make for themselves, and to hold that they were not bound by the words they have used.

Then at the foot of the conditions indorsed on the back of the ticket there is this note: "In the event of this ticket being lost, a reward of 10*s.* will be given to any person who brings it to the secretary, London Bridge station."

The sixth condition provides "That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions."

Now if the ticket be lost, and yet there is no forfeiture, the consequences will be that the company may pay 10*s.* to the finder who brings the lost ticket to them, and also be obliged to pay the 10*s.* over again in such an action as the present to the season ticket holder. That is a case very likely to happen where a man by accident loses his ticket out of his pocket.

We cannot release the plaintiff from any one of these stipulations, or hold that a breach of any one of them is not a cause of forfeiture, without holding that the whole of them are void. If the plaintiff can set up an equitable claim for relief, on the ground that the condition as to forfeiture of the deposit must be considered as a penalty and not as liquidated damages—if that is so as to a breach of any one of the conditions, it must be so as to a breach of every one of them.

There is nothing illegal or inequitable in these conditions. To the defendants it is of the greatest importance that they should have in their books a statement of the number and description of their season tickets, so that they may know what tickets are in

force and what are not, and they have a right to impose on the purchasers of season tickets—which no one need buy unless he likes — conditions of forfeiture. No one can tell what consequences may ensue to the company from the breach of any of the conditions.

The cases cited, where courts of equity have interposed or relieved from forfeiture, have no application to the present case. Every case, whether that of a claim of a tenant to be relieved from forfeiture for non-payment of rent or any other claim, must be determined on its own circumstances.

Looking at the particular circumstances of this case there will be no hardship whatever on the plaintiff, but the greatest hardship on the defendants, if the contract is not strictly performed. I think every word and letter of the contract must be strictly construed and enforced, and therefore that in the present case a forfeiture has been incurred.

HAWKINS, J. I am of the same opinion. When the contract entered into between the plaintiff and defendants is looked at the matter is clear. The plaintiff seeks to recover 10*s.* deposited with the defendants at the time when they issued to him a season ticket entitling him to travel for one month. The 10*s.* were deposited subject to a stipulation that they should be forfeited if any one of certain conditions were broken. The fulfilment of those conditions was therefore a condition precedent to a right of action to recover the money. Now it is clear that the fourth condition has not been fulfilled, because the ticket was not delivered up "on the day after expiry." The plaintiff's counsel contends that the condition ought to be read as if those words were not there, and and there were substituted for them the words "within a reasonable time." There is no ground for such a reading, and it is clear from the sixth condition that the 10*s.* are forfeited, and cannot be recovered unless each stipulation is fulfilled. Whether it be a reasonable or unreasonable condition that the ticket be given up on the very day after expiry is not a question in the present case; but if it were I should say it was very reasonable, for I can see that there is great danger of frauds being extensively practised on

1879

COOPER v. LONDON AND BRIGHTON RAILWAY CO.

the company if season tickets are not delivered up as soon as they expire.

But my judgment in favour of the appellants rests on the terms of the contract, that the deposit is to be returned only on fulfilment of every one of the conditions, and that one of these conditions has been broken.

Judgment for the defendants. (1)

Solicitor for plaintiff: *T. C. Russel.*

Solicitors for defendants: *Norton, Rose, Norton, & Brewer.*

March 17. THE SWANSEA BANK, LIMITED, *v.* THOMAS, TRUSTEE OF THE ESTATE OF JOHN LEWIS WILLIAMS, IN LIQUIDATION.

Landlord and Tenant—Assignee assigning over—Apportionment of Rent—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 3, 4.

The residue of a term under a lease having become vested in the trustee of the lessee, who was a liquidating debtor, the trustee assigned over during a current quarter. In an action, brought after the expiration of the quarter against the trustee by the lessor, to recover a proportionate part of the quarter's rent up to the time of the assignment over by him:—

Held, that the Apportionment Act, 1870, applied, and that the lessor was entitled to recover.

SPECIAL CASE stated by consent, from which the following facts appeared:—

John Lewis Williams, in April, 1875, became tenant of a house and premises at Swansea under a lease for twenty-one years, at a specified rent payable quarterly on the usual quarter days.

The lease contained a covenant that the lessee would not assign, underlet, or part with the possession of the premises without licence in writing. There was a proviso for re-entry on non-payment of rent or breach of covenant. In August, 1877, the reversion of the premises expectant upon the term of twenty-one years became vested in the plaintiffs.

In March, 1876, John Lewis Williams entered into an arrange-

(1) Leave to appeal was refused, except on the terms (which the plaintiff's counsel declined to accept) that the plaintiff should give up the benefit as to costs imposed by the Judge of the City of London Court.

ment with his creditors for liquidation of his affairs by arrangement. The defendant was appointed trustee in April, 1876, and entered into possession and paid the rent reserved by the lease up to the 29th of September, 1877.

In November of the same year the defendant applied to the county court, under the Bankruptcy Act, 1869, for leave to disclaim the leasehold interest in the premises, but the application was refused.

On the 6th of December, 1877, the defendant, by deed, assigned the premises to one Edward Thomas for the unexpired residue of the term of twenty-one years, but no licence was given for such assignment, nor did the plaintiffs accept Edward Thomas as their tenant of the premises.

The question for the opinion of the Court was whether the plaintiffs were entitled to recover from the defendant the whole of the rent payable in respect of the house and premises for the quarter ending on the 25th of December, 1877, or an apportioned part thereof for the portion of the quarter ending on the 6th of December, 1877, or any and what part of such rent.

C. James, for the plaintiffs, did not contend that the trustee was liable for the quarter's rent, but argued that the claim for a proportioned part of the rent was well founded, on the ground that the Apportionment Act, 1870 (1) made the rent accrue from day to day. He was then stopped.

Wills, Q.C. (*Brynmor Jones*, with him). The Act of 1870

(1) 33 & 34 Vict. c. 35, an Act for the better Apportionment of Rents and other Periodical Payments, recites: "Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising, divers statutes have been passed," enumerating 11 Geo. 2, c. 19, 4 & 5 Wm. 4, c. 22, 6 & 7 Wm. 4, c. 71, 14 & 15 Vict. c. 25, and 23 & 24 Vict. c. 154. "And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences, be it enacted . . . . as follows:—

"2. From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

By s. 3 the apportioned part of rent, &c., is to be payable when the next entire portion shall have become due.

1879

SWANSEA BANK v. THOMAS.

intended that there should be one action for rent, and that the parties should apportion it themselves, not that there should be two rights of action. The Act is in continuation of prior Acts, and should be interpreted with reference to the evils intended to be remedied by those Acts. Here the incoming tenant would be liable for the quarter's rent due at Christmas. It must be admitted that unless the case is within the proviso to s. 4 (1), then it will be within s. 2.

C. James, was not called upon to reply.

PER CURIAM (Kelly, C.B., and Huddleston, B.). The words of s. 2 of the Apportionment Act are wide enough to include this case, and the plaintiffs are entitled to recover an apportioned part of the rent for the time the defendant was in occupation.

Judgment for the plaintiffs. (2)

Solicitors for plaintiffs: *Visard, Crowder, & Anstie, for Brown, Collins, & Wood, Swansea.*

Solicitors for defendant: *Bacon & Turner, for C. H. Glascodine.*

(1) 33 & 34 Vict. c. 35, s. 4: "All persons, and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that persons liable to pay rents reserved out of, or charged on, lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

(2) Query, whether the Apportionment Act, 1870, was intended to introduce any new law as between landlord and tenant, or payer and recipient, or to do more than regulate further, between themselves, the rights of those who have to receive rents, annuities, dividends, and other periodical payments?

JONES, APPELLANT; THE CWMORTHEN SLATE COMPANY, LIMITED, RESPONDENTS. 1879 *March* 5.

Revenue—Slate Quarry—Underground Working—5 & 6 Vict. c. 35, s. 60, Sched. A, No. 3.

Works for the getting of slate are assessable to the income tax under 5 & 6 Vict. c. 35, sched. A, as quarries of slate and not as mines, though all the slate is obtained by underground working.

CASE stated by Commissioners of Income Tax.

The respondents appealed against a charge of 6373*l.* made upon the company in the assessment under Schedule D for the parish of Festiniog, for the year 1877–8, in respect of profits as a slate company, under Rule 1 of No. 3 of Schedule A (5 & 6 Vict. c. 35).

The respondents contended that the concern was a mine, and claimed to be assessed on the average profits of the five preceding years, under Rule 2 of No. 3 of Schedule A (5 & 6 Vict. c. 35) on the ground that the concern came under the title "and other mines."

It was explained that originally the concern was worked in the open, but for some years the slates have been got by means of levels driven straight into the mountain to a distance of from 250 to 300 yards; those levels were about five feet wide and seven feet high, and the whole process was carried on underground. Under the Metalliferous Mines Act (35 & 36 Vict. c. 77) they were deemed to be a mine, and also for poor-law and other purposes.

A short-hand note of an argument and judgment in the Court of Queen's Bench in a case in which the respondents were defendants was also put in, in which the Court held the concern to be a mine. (1)

The appellant, the Surveyor of Taxes, argued that the concern was a quarry, and that the wording of Rule 1 of No. 3 of Schedule A (5 & 6 Vict. c. 35), as follows, "of quarries of stone,

(1) *Sims* v. *Evans*, before Blackburn, Quain, and Field, JJ., on the 2nd of June, 1875, not reported.

1879

JONES v. CWMORTHEN SLATE CO.

slate, limestone, or chalk, on the amount of profits in the preceding year," was decisive of the question, and that it was impossible to regard a slate quarry as a mine under Rule 2, which applies to "mines of coal, tin, lead, copper, mundic, iron, and other mines."

The commissioners were of opinion that the concern was a mine, and gave their decision accordingly, but stated this case for the opinion of the Court.

Dicey, for the appellant. Primâ facie, this property was assessable as a quarry under the first part of Rule 3, and it lies on the respondent to shew that the fact is otherwise. The Act is intended to mark the difference in the produce, and to impose a different mode of assessment on the two classes of produce.

A. L. Smith, for the respondents. The words of the Act cover all mines by the expression "other mines." This open working or quarry has been converted into a mine, and must be assessed accordingly. The case of the *Duchess of Cleveland* v. *Meyrick* (1) is a direct authority. There the testator bequeathed his shares in mines, and shares in what had been a slate quarry but had become an underground working for slate were held to pass. Malins, V.C., on a review of the cases, said: "Therefore I find that the authorities both at law and in equity concur in this, that if the operations carried on are in fact mining operations and not surface operations, whatever may be the material gained, whether it be slate, as in the present case, limestone, as in *Rex* v. *Inhabitants of Sedgley* (2), or clay, as in *Rex* v. *Brettell* (3), the criterion is not the material obtained, but the mode in which it is obtained." In *Sims* v. *Evans* (4), referred to in the case, the question arose under the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), which requires all mines to be guarded. It was conceded by counsel for the company that this was a mine within the provisions of the Poor Law Act, and the Court decided that it was a mine "with a shaft for the purpose of getting minerals, to wit, slates."

Dicey was not called on to reply.

(1) 37 L. J. (Ch.) 125.
(2) 2 B. & Ad. 65.
(3) 3 B. & Ad. 424.
(4) *Sims* v. *Evans*, before Blackburn, Quain, and Field, JJ., on the 2nd of June, 1875, not reported.

KELLY, C.B. We may either construe these words in their popular sense or we may look to the precise words of the Act, and see if we can deduce from them the intention of the legislature. We do not hear the term "slate mine" used in common parlance, the expression being "slate quarry," and I should hesitate, in the absence of special circumstances, to hold that a slate quarry could be a mine. In the case to which reference has been made, argued in the Court of Queen's Bench, the largest interpretation was put upon the expression, because the object of the statute with which the Court was concerned was to protect the lives and limbs of her Majesty's subjects. Looking at this Act, there are two descriptions of property to be liable to the income tax, the one quarries of stone, slate, limestone, or chalk, on the amount of profit in the preceding year; the other, mines of coal, tin, lead, copper, mundic, iron, and other mines. If slate had been intended to be included in this second clause, they might have repeated it, and the absence of the expression "mines of slate" looks as if the distinction were purposely pointed out, and confirms the view I take on the popular signification of the words.

In construing this statute which relates to the taxation of the subject, we must look to the precise words used. So doing, in my opinion the subject-matter of this appeal is taxable as a quarry and not as a mine, and comes within the first rule only.

POLLOCK, B. I am of the same opinion. The true mode of dealing with the question is to take the statute in which the words occur, and see what from these words must be taken to be the intention of the legislature, giving to the words the best meaning to carry out that object. In the case of the *Duchess of Cleveland* v. *Meyrick* (1) no such question arose as here. There were no other mines to which the words of the will would refer, and if those words did not pass the slate quarries, there was an intestacy as to that part of the testator's estate. In the case in the Queen's Bench the object and intention of the legislature was to shield persons from danger. Now, whatever the output of the mine, protection is required according to the character of the working, not of the output. Further, the interpretation clause in the 41st

(1) 37 L. J. (Ch.) 125.

1879

JONES v. CWMORTHEN SLATE CO.

section of the Metalliferous Mines Regulation Act shews that the word "minerals" is used there in its widest sense.

In the Income Tax Acts the words are perfectly distinct in the two parts of the rule. In the one case the expression used is "quarries," in the other "mines." It is impossible not to see that there is an antithesis between these expressions, and looking to that and to the fact that no man sinks a shaft to get slate, it seems to me that this was a quarry, and that the appellant is entitled to our judgment.

Judgment for the appellant.

Solicitor for Crown: *Solicitor for Inland Revenue.*
Solicitors for respondents: *Gregory, Rowcliffes, & Rawle.*

March 5.

RILEY, APPELLANT; READ, RESPONDENT.

Revenue—Inhabited House Duty—Inhabited Dwelling-house—48 Geo. 3, c. 55, Sched. B, No. 5—14 & 15 Vict. c. 36.

A building was used part of it as a club and the remainder as an auctioneer's office. It was only occupied during the day and no person slept there:—

Held, that it was not an inhabited dwelling-house so as to be liable to inhabited house duty under 14 & 15 Vict. c. 36.

CASE stated by commissioners for the general purposes of the income tax, and for executing the Acts relating to the inhabited house duties.

The appellant, on behalf of the Working Men's Reform Club, William Street, in the township of Over Darwen, appealed against an assessment to inhabited house duty, for the year ending the 5th of April, 1877, upon the annual value of the building occupied by the club.

The appellant claimed exemption on the ground that the building was not an inhabited dwelling-house within the meaning of the Act 14 & 15 Vict. c. 36, inasmuch as the place was not, and never had been since its erection, furnished as a dwelling-house or slept in at night, and was used during the daytime for club and trade purposes only. He stated that the upper floor of the

building was let to an auctioneer, who used it during the daytime as a place for sale of goods, and, being a place used entirely for trade purposes, was not liable to inhabited house duty.

The respondent, the surveyor of taxes, stated that he had seen the premises, and found the building to consist of two storeys. The ground floor was occupied by the appellants as a club, and contained the usual rooms, namely, billiard-room, news-room, lavatory, &c. The upper floor was let to an auctioneer, and used by him as a place of trade. The club was open each day from 9 A.M. to 10.30 P.M., and was then closed for the night, no person remaining inside the premises. The surveyor contended that the building came within the scope of 48 Geo. 3, c. 55, Sched. B, No. 5, and that it was not necessary for a building to be slept in to render it liable to inhabited house duty. In support of these views he referred to case 2760, decided by the judges on the 15th of February, 1867, and contended that as the place was not used for trade, but in the manner above stated, it was not within any of the exemptions contained in the Acts.

The appellant sought to distinguish the present case from the case No. 2760, inasmuch as the present building had never acquired the character of a dwelling-house, by reason of its never having been furnished or slept in as such.

The commissioners were of opinion that the club was liable, but stated this case for the opinion of the Court.

Bush Cooper, for the appellant, contended that the building did not constitute an inhabited dwelling-house, and referred to the schedules A and B of 48 Geo. 3, c. 55, to shew that there was a distinction between an inhabited dwelling-house in respect of which the occupier was charged, and a place where no person slept, in which case the owner was charged, as under Schedule B, rule 5.

Dicey (*Sir H. Giffard, S.G.*, with him), for the Crown, contended that living on the premises at night was not necessary to constitute an inhabited dwelling-house, and that persons dwelt in this house in the daytime. The statute 57 Geo. 3, c. 25, s. 1, speaks of places where no person inhabits, dwells, or abides, except in the daytime, shewing that a nightly residence is not

1879

RILEY v. READ.

necessary to constitute dwelling. He referred to *Busby* v. *Newson*. (1)

Bush Cooper did not reply.

KELLY, C.B. It appears to me that this claim cannot be sustained. The Acts of Parliament referred to impose a tax on inhabited dwelling-houses, and the question is whether this building is an inhabited dwelling-house within the meaning of those Acts, though no person sleeps there or has slept there. Looking at the description of this building given in the case, it appears that the whole building is occupied either as a club or for trade purposes, and the question is, whether under these circumstances the building is subject to the tax. The statutes say that what is taxable is an "inhabited dwelling-house." If "inhabited house" were the thing mentioned, we should have to consider whether there might not be inhabitancy though no one slept on the premises, but when we find the Acts speak, not of "inhabited houses" but of "inhabited dwelling-houses," we must put a construction not only on the word "inhabited" but on the word "dwelling" as applied to house. Is this such a place unless one or more persons sleep in the house? I think not. If there were any statute defining the expression and shewing that the term dwelling-house was meant to apply to such a place as the present, or if there were any authority to shew that the expression might apply to a mere occupation in the daytime, in other words, if there were either an Act of Parliament or a decision of a Court of Law which shewed that a place might be taxed as an inhabited dwelling-house in which no person slept or had slept, we should be bound by such Act or decision, but in the absence of that, we must put our interpretation on the words of the statutes. My interpretation of "to dwell," is "to live and occupy for all the purposes of life." Is there anything to shew that this is not so? Referring to the dictionaries, in no one do I find the word "dwell" used, except in the meaning of reside or live, and we have not been referred to any writers of the last two or three centuries to shew that the word "dwell" has been used in such a manner that we must interpret it in any other mode. There

(1) Law Rep. 10 Ex. 322.

is something plausible at first sight in the argument founded on the recital of 57 Geo. 3, c. 25, but that Act, in my opinion, referred to cases where, besides the residence, there were separate buildings in respect of which persons have been assessed to and paid duty, such buildings not being physically connected with the residence, or forming part of it, but in connection with it, and I think the preamble refers to such cases.

I think we should take the plain and natural meaning of the word "dwelling," which is equivalent to residing or living day and night, and as this place was not so occupied, the assessment cannot be supported.

POLLOCK, B. In my judgment the members of the club who occupy this building are not properly assessable to inhabited house duty. If it were necessary to decide that in all cases, in order to make a building assessable as an inhabited dwelling-house, some person must sleep on the premises as well as occupy them by day, I should pause before coming finally to that conclusion; though I agree with what has fallen from my Lord, I must admit that there are some passages in the statutes which tend to support the opposite view. I think, however, this is quite a different case from that of a person occupying a place by day, either by himself or his clerks and servants, and another place by night as his ordinary place of abode. This is the case of a number of persons using the premises as a club to which they may resort, and whether such a place should be assessable or not, it seems to me that, looking at the ordinary meaning of the words "inhabited house" and "inhabited dwelling-house," it would be a misapplication of language to apply them to this case. On these grounds I think the assessment is wrong, and cannot be supported.

Judgment for the appellant.

Solicitor for Crown: *Solicitor for Inland Revenue.*
Solicitors for appellant: *Pritchard, Englefield, & Co.*

1879
March 14.

HOUGH & CO. *v.* MANZANOS & CO.

Principal and Agent— Charterparty—Description of Person signing as Agent for Charterers—Unqualified Signature—Liability as Principal.

A charterparty was entered into between plaintiffs, shipowners, and defendants "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading and payment of advance. In an action for breach of the charterparty, the defendants by their statement of defence denied their personal liability:—

Held, on demurrer, that the defendants were liable on the charterparty.

THIS was an action by the plaintiffs, as owners of the steamship *Ellen*, against defendants as charterers, on a charterparty expressed to be for as many voyages as the ship could do during six calendar months. The alleged causes of action were detaining the ship and refusal to load for the fourth and fifth voyages.

The defence set out the charterparty, which was expressed to be entered into "between Hough & Co., owners of the good steamship or vessel called the *Ellen* or similar boat of the burthen of 900 tons or thereabouts, now at Newport, and Manzanos, Cristobal, & Co., as agents for charterers." The ship was to load "from the agents of the said freighters." (1) The captain was to sign bills of lading at any freight required by the "charterers" not less than certain specified rates. The captain was to have an absolute lien on the cargo for all freight, dead freight, and demurrage due under the charterparty. The charterparty further contained the following clause: "This charter being entered into on behalf of others, it is agreed that all liability of charterers shall cease on completion of loading and payment of advance, captain having a lien on cargo for freight, dead freight, and demurrage." The charter was to be in force for as many consecutive voyages as the vessel could do in six calendar months, to begin on signing first bill of lading; and it was signed by the defendants "Manzanos, Cristobal, & Co.," while the signature on behalf of the plaintiffs was "By authority of Hough & Co., and, as agents p. pr. W. Y. Edwards, Fred. Edwards."

(1) The word "freighters" had not appeared before in the charterparty.

1879

HOUGH v. MANZANOS.

The third paragraph of the statement of defence was that the defendants in making the charterparty were agents for the charterer therein referred to, that is to say, Eusebio Garcia, of Bilbao, in Spain, and they entered into the same on his behalf.

There were demurrers on the part of the defendants to a part of the statement of claim, and a demurrer by the plaintiffs to so much of the defence as denied the personal liability of the defendants.

March 11. *Douglas Walker*, for the plaintiffs. The defendants are liable on the charterparty. They have signed in their own name without any qualification. The rule is correctly laid down in 2 Smith's Leading Cases, in the notes to *Thomson* v. *Davenport* (1), thus: "It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is primâ facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal." A declaration that a party makes a contract on behalf of others, standing alone, does not prevent his suing in his own name: *Cooke* v. *Wilson* (2); and *Oglesby* v. *Yglesias* (3) shews that the defendants are not relieved from liability by the statement that they are agents for the charterers. The defendants have not signed as agents, though the plaintiffs' agents did so, and in view of the cases it cannot be gathered from the charterparty that they were to be taken to be agents.

Hannen, for the defendants. The charterers and the agents are distinguished throughout this charterparty, and the defendants have done everything to shew that they are agents except adding to their signature a second statement of that fact. This omission cannot shew that they intended to be bound as principals. [He cited *Gadd* v. *Houghton* (4); *Paice* v. *Walker*. (5)]

Douglas Walker, in reply.

Cur. adv. vult.

(1) 7th ed. p. 386.
(2) 1 C. B. (N.S.) 153; 26 L. J. (C.P.) 15.
(3) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(4) 1 Ex. Div. 357.
(5) Law Rep. 5 Ex. 173.

1879

HOUGH v. MANZANOS.

March 14. POLLOCK, B. This case was argued before me on Tuesday last on cross demurrers to a statement of claim and defence. The action was on a charterparty signed by the defendants in their own name, that is, in the name of the firm, without any qualification. In the body of the charterparty the defendants were described as agents for the charterers. The charterparty contained a clause like that called the cesser clause usually inserted in charterparties, by which it was provided that upon the completion of the loading "this charter being entered into on behalf of others all liability of charterers shall cease." The plaintiff claimed for demurrage and damages for not loading the vessel. Two points taken for the defendants were disposed of on the argument, and it is not necessary now to refer to them. The third point was whether under this charterparty the defendants could be sued at all, and this I took time to consider, as the law on the subject is not in a satisfactory state, and I wished to consider the cases further before giving judgment.

On the cases, though I do not say that some of them might not be questioned on appeal, I feel bound to give judgment for the plaintiffs. The defendants have signed the charterparty without any reservation, and the rule of law which has been quoted from Smith's Leading Cases applies. That rule is, that where a person signs a contract in his own name without qualification, he is primâ facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal. Now the words "as agents for charterers" do not in themselves, as the cases decided on the subject shew, make that intention apparent. Thus from *Oglesby* v. *Yglesias* (1) it appears that the words "as agent for the freighters" in the body of the charterparty would not relieve the party signing from liability. In *Paice* v. *Walker* (2) the words "as agents for" a named foreign principal were held to be a mere description of the defendants, and not to free them from liability. In *Gadd* v. *Houghton* (3), which was tried before me at Liverpool, the words were "on account of" a foreign principal.

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.

(2) Law Rep. 5 Ex. 173.

(3) 1 Ex. D. 357.

1879

HOUGH v. MANZANOS.

In that case I held that the defendants were not liable, and this judgment, though overruled by the Exchequer Division, was upheld in the Court of Appeal. James, L.J., based his decision on the difference between the expressions "as agents for" and "on account of," a distinction I confess I cannot appreciate, but which leaves *Paice* v. *Walker* (1) an authority binding on me here. I think on the cases it is clear that I must, in the present instance, give my judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Lyne & Holman.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

[IN THE COURT OF APPEAL.]

March 22.

GIRDLESTONE *v.* THE BRIGHTON AQUARIUM COMPANY.

Penalty, Action for—Judgment recovered for same Offence—Covin and Collusion —21 Geo. 3, c. 49.

The defendants pleaded in bar to an action to recover a penalty for breach of 21 Geo. 3, c. 49, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants and without the interference of R.: it was commenced for the protection of the defendants from any action brought or to be brought in respect of the penalty claimed in it; and also for the purpose of taking the Home Secretary's opinion whether he would remit the penalty:—

Held, affirming the judgment of the Exchequer Division, that the judgment recovered was no bar to an action for the same offence by a different plaintiff.

By Brett, L.J., on the ground that the judgment had been recovered in an action in which the present defendants were, in truth, both plaintiffs and defendants.

By Thesiger, L.J., on the ground that the judgment had been obtained by covin and collusion.

By Cotton, L.J., on both grounds.

APPEAL from the judgment of the Exchequer Division in favour of the plaintiff. (2)

Action for penalties under 21 Geo. 3, c. 49.

The facts are sufficiently stated in the judgments.

(1) Law Rep. 5 Ex. 173 (2) 3 Ex. D. 137.

1879

GIRDLESTONE v. BRIGHTON AQUARIUM CO.

The arguments and the cases cited are the same as in the Court below.

Feb. 28. Sir *H. S. Giffard, S.G., Waddy, Q.C.,* and *Bosanquet,* for the plaintiff.

C. Russell, Q.C., and *John Macdonell* (*MacMillan,* with them), for the defendants.

Cur. adv. vult.

March 22. The following judgments were delivered:—

BRETT, L.J. In this case the action is brought by the plaintiff against the defendants to recover a penalty; and the answer, in point of fact, is that another person had before the plaintiff brought his action recovered a judgment for a penalty for the same offence. To that it is replied, first, that no such person ever recovered such a judgment; and, secondly, if such judgment was recovered, it was recovered by covin and collusion. The case was tried before Cleasby, B., and it seems to me that his direction to the jury really amounted to this; that they might find that the suggested previous judgment had no effect, although there was no fraud whatever on the part of either party concerned in obtaining that judgment. The jury thereupon found for the plaintiff; the Exchequer Division have affirmed that judgment. If it were necessary, in my opinion, in order to support the decision of the Court, to say that there had been any fraud, I could not agree with it, because it seems to me that there is not a symptom of fraud from beginning to end. In my opinion, the transaction was an honest transaction, honest in every part of it, and I see no harm, morally speaking, in what was endeavoured to be done. There was a difference of opinion amongst persons as to the propriety of any one suing for penalties under 21 Geo. 3, c. 49; and thereupon the solicitor to the defendant company requested a person, who was of opinion that such penalties ought not to be sued for, to sue for the penalty of 100*l.* He did that, no doubt, with two intentions; one intention was that if other persons should afterwards sue for penalties the judgment obtained upon this suit should be an answer to them. He also did it, because it was supposed that if penalties were recovered the Home

Secretary, exercising his discretion, might (for nobody, of course, could say whether he would) relieve the defendant company from the payment of the penalties. Neither object seems to me to be illegal or immoral in any sense. The defendants' solicitor had requested a person to bring an action, if you please, for the purpose of protecting the company; it is not shewn that that person knew that at that time another action had been commenced; but the fact of his not knowing it is not material, for even if he had known it, I should have been of the same opinion. But the defect in the judgment which was obtained seems to me to have arisen from the over-caution of the defendants' solicitor. If he had asked the person Rolfe to bring the action, and if Rolfe had instructed a solicitor to bring the action and he had brought it, although he had bound himself, as it is said, in honour not to insist upon the payment of the penalty, in the absence of finding of any fraud by the jury I should have thought that judgment was valid, and that it could not have been set aside under a plea of covin and collusion, because the plea of covin and collusion is not proved in its legal effect, unless the jury find there was something wrong in the mind of the parties who had agreed to the judgment. I should think the jury would have to find that there was something wrong in the minds of both the parties. The defendants' solicitor asked Rolfe to allow him, the defendants' solicitor, to bring an action against the defendants, using Rolfe's name, and the supposed plaintiff did not exercise any judgment upon the action. He exercised no control. He did not instruct anybody; he did not become liable to anybody for what was done; he did not know of the course of the action; he did not, in fact, so far as I see, know whether the action was brought or not, the only thing that happened was that he was asked whether he would lend the defendants' solicitor his name in order that the defendants' solicitor might bring an action against the defendants. It shews to my mind that Rolfe never was a plaintiff, and that the only plaintiff in that suit was the defendants' company. Therefore, the defendants' company were the plaintiffs in that suit, and they were also the defendants; therefore the judgment recovered in form was no judgment—no judgment which can be said to have been recovered by a third party. If that be so,

1879

GIBDLESTONE v. BRIGHTON AQUARIUM CO.

the plaintiff's judgment is the first judgment that has been recovered, and if the matter had been pleaded not in the form of covin and collusion, but stating the facts, those facts stated upon replication would have shewn that the judgment alleged in the defence was no judgment. Upon that ground, as I say deliberately, it being my opinion that there is no evidence of fraud, or of anything which can in any way be deemed fraud, there was no judgment in Rolfe's action, and, therefore, the plaintiff's is the first judgment, and he is entitled to succeed. It is upon that ground alone that I concur in affirming the judgment of the Exchequer Division.

COTTON, L.J. This was a motion by the defendants, by way of appeal from the decision of the Exchequer Division, for a new trial, on the ground of misdirection by the judge before whom the case was tried.

The action was to recover a penalty under the 21 Geo. 3, c. 49. This Act makes the penalty a debt due to the person who sues for it. The defendants pleaded a judgment in respect of the same offence, that is, keeping open the aquarium on Sunday, the 15th of August, obtained at the suit of Rolfe. The plaintiff replied that the judgment was obtained by covin and collusion, and the jury found for the plaintiff on the issue; and there was a verdict and judgment for the plaintiff. There was an application to the Exchequer Division for a new trial, but that Court refused to interfere, hence the appeal to us.

This action was commenced on the 17th of August, 1875. There was evidence at the trial that in October the solicitor of the defendants saw Rolfe, and that at his request Rolfe authorized him to commence in the name of Rolfe an action against the company, for penalties incurred for keeping open the aquarium on the 15th of August, and on the Sundays intervening between that day and the 20th of October. That the solicitor of the company accordingly instructed the solicitor who appeared on the record, for Rolfe, that this solicitor received no instructions in the matter from Rolfe, that on the 28th of October the company suffered judgment by default, that this judgment had never been enforced, and that although there was no positive agreement that the

judgment should not be enforced against the company, there was an honourable understanding between Rolfe and the company that the action brought in his name was to be a protective action, and that Rolfe should not issue execution. One of the objects in allowing Rolfe to obtain judgment was to ascertain in an action in which the plaintiff was not hostile, whether the Home Secretary would exercise the power given to him by a recent Act, of preventing penalties being enforced, and it was proved that till after the judgment pleaded was confessed, neither Rolfe nor the solicitor who appeared as his solicitor on the record knew of the present action. On this evidence the defendants contended that Rolfe had no intention of defeating the claim of the plaintiff in the present action, and that his intention to protect the company was not sufficient to support the plea of covin and collusion. The learned judge in summing up in effect told the jury that it was not necessary, for the support of this plea of covin and collusion, to shew that Rolfe knew of the plaintiff's action, that even though the object of the company in procuring the action to be brought was to obtain the decision of the Home Secretary, the judgment would be one obtained by covin and collusion if in fact there was no intention to take out execution or otherwise enforce the judgment, and if the intention was to protect the company. The jury on this direction found for the plaintiff, and I am of opinion that there was no misdirection, and that there was ample evidence to support the verdict. There was much argument before us as to the meaning of the word "covin." It may be assumed that the meaning of the reply is that the judgment was obtained by an agreement between Rolfe and the defendants the company. For, even if the word "covin" does not of itself import an agreement between two, covin and collusion do. I am also of opinion that to make an agreement covinous there must be something in it which in the view of the law is deceit. Now, in an action for penalties the plaintiff is, ordinarily and in the absence of agreement between him and the defendant, a person independent of, and adverse to, the defendant, seeking to obtain a judgment as a means of enforcing for his own benefit payment of the penalty. If in such an action, though the plaintiff is apparently independent of the defendant, he has by agreement with the defendant allowed his name to be used

1879

GIRDLESTONE v. BRIGHTON AQUARIUM CO.

as plaintiff and authorized the defendant, or his solicitor, to instruct a solicitor to act for him the nominal plaintiff, and there is an agreement or understanding that judgment in the action shall not be enforced, but used as a protection to the defendant against other actions either already brought or which may be brought to recover a penalty given by statute, then the action is one in which the company are in substance both plaintiff and defendant, and this agreement or arrangement is an agreement or arrangement that the position of the parties to the action apparently hostile shall be friendly, that the action and judgment, which purport to be an attack on, shall in fact be a protection to, the defendant, an agreement that the reality shall be different from what is represented. This in my opinion is (even in the absence of any intent to defraud) deceit, and in my opinion though the agreement or arrangement be not legally binding, the judgment confessed or obtained under it will have been obtained by covin and collusion, and cannot be relied on by the defendant in answer to an action in respect of the same matter brought by any other person, and the learned judge so directed the jury. It was urged upon us that, to support the defence of covin and collusion, it was necessary that the agreement should be intended to deprive or defraud the plaintiff in the present action of his claim, that Rolfe had no such intention, and that neither he nor his solicitor knew of the present action till after judgment was confessed in Rolfe's action. But it was stated by the solicitor of the defendants that the object of the action commenced in Rolfe's name was to protect the defendants, that is to defeat the claim of any person who might endeavour to obtain judgment for penalties for keeping open the aquarium on any Sunday covered by that action, and if so, in law the parties to the agreement are to be considered to have intended to defeat the claim of the plaintiff, as one of the general body against whose claims the action brought in Rolfe's name was intended to protect the defendants. It was strongly pressed in support of the appeal that the object of that action was to obtain a judgment on which the decision of the Home Secretary could be taken as to the course which he would adopt, and that this was disregarded by Cleasby, B. In my opinion he was right in so doing. It is unnecessary to consider whether the intention to apply to the

Home Secretary as if Rolfe were an independent plaintiff seeking to enforce payment of the penalties, while in fact he was as plaintiff in the action a mere name used by the company by means of which name the company had obtained a judgment for their own protection, was not in itself an argument against the validity of the judgment. But the circumstance that one of the objects was to apply to and obtain the decision of the Home Secretary, does not in my opinion make the judgment less covinous and collusive if it was obtained in an action in which there was not any real plaintiff, and under an arrangement that it should be used not to recover penalties from the defendants, but to protect the defendants from the claims of others who might probably sue. I may add that the decision might, independently of the reasons which I have already given, be supported on the ground that in substance there was no judgment, the plaintiff on the record having been under the circumstances the defendant under another name.

In my opinion the appeal fails, and must be dismissed with costs.

THESIGER, L.J. I also am of opinion that the decision of the Court below should be affirmed.

The defendants plead in bar to an action to recover a penalty a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced at the request of the defendants' solicitor while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants, and without the interference in any way of the nominal plaintiff. It was an action not brought for the purpose of giving the person named as plaintiff the fruits of it, or indeed any benefit whatever from it, but immediately for the protection of the defendants from any action brought or to be brought against them in respect of the penalties which were claimed in it, and mediately for the purpose of taking the Home Secretary's opinion upon the point whether he would remit such penalties. Apart from any question upon the pleadings, is it possible that a judgment so obtained and in such a suit can bar the plaintiff's action? Was the action in which it was obtained, in substance, anything more than one in which the

1879

GIBDLESTONE v. BRIGHTON AQUARIUM CO.

defendants were the real plaintiffs, as well as the nominal and real defendants? I think not, and if it was not, then the mere statement of the character of the action is a sufficient argument against the judgment obtained in it operating as a bar to the present action. But the plaintiff has, in his reply to the statement of defence, impeached the judgment upon the special ground of "covin and collusion." The argument, therefore, before us has been addressed to the question whether the facts of the case establish that the judgment is so impeachable. In dealing with this question I assume that Rolfe, when he assented to an action being brought in his name, was unaware of the fact of the present action having been commenced; I assume, too, that the jury have negatived fraud in the sense of there having been a wicked mind and intent on the part of Rolfe and the defendants, or either of them, in instituting or assenting to the institution of the proceedings which led to the judgment. I think, nevertheless, that they were legally guilty both of covin and collusion. Although the word "covin" is sometimes, especially by old writers, used in the sense of a trick or contrivance devised by one person alone, I think that in a case like the present, and where it is used in conjunction with the word "collusion," it imports a trick or contrivance planned by both parties to the transaction which is alleged to be tainted by it. I go further, and take it to be a trick or contrivance which must be proved to be, to use the language in Co. Lit. 357*b*, "to the defrauding and prejudice of another." Assume all that, and still the contention of the defendants appears to me to be inadmissible. If Rolfe had known of and intended to defeat the plaintiff's bonâ fide action by permitting a sham action to be brought in his own name, it is clear that he would have been a party to a trick or contrivance for defrauding the plaintiff. Prejudicing a bonâ fide action for a statutory penalty by the secret contrivance of a sham one can be nothing less than defrauding. Indeed, it is hardly disputed on the part of the defendants that under such circumstances the allegation of covin and collusion would be established. But if so, surely the intention to prejudice or defraud a class of persons, including the plaintiff, must equally establish the allegation, although the plaintiff was not known to form one of the class

intended to be prejudiced or defrauded. There is legislative authority for this view. The statute 4 Hen. 7, which was passed for the purpose of preventing proceedings taken in good faith to recover the penalties being defeated by sham protective actions, made punishable, under the name of covin and collusion, such actions, not only when brought for the purpose of defeating bonâ fide proceedings already taken—in other words, prejudicing a particular individual; but also of defeating such proceedings, although not yet commenced—in other words, of prejudicing an individual not yet identified and known. The statute also provided that such covin and collusion might be averred, in answer to any plea setting up a recovery in a covinous and collusive action in bar to bonâ fide proceedings. I would only add that although, as has been suggested, the motives of the defendants and Rolfe in endeavouring to obtain the decision of the Home Secretary as to the remission of penalties may have been good, and the end, the keeping the aquarium open on Sundays, may have been a desirable one, it appears to me impossible to hold with reason that the co-existence of such motives, or such an end with motives, ends, and acts, which standing by themselves, constitute covin and collusion, can make the case any the less one of covin and collusion, or in any way remove or lessen the legal consequences which covin and collusion entail.

Judgment affirmed.

Solicitors for plaintiff: *Bridges, Sawtell, Heywood, & Co.*
Solicitors for defendants: *Benham & Tindell.*

1879
Jan. 25.

FORBES AND ANOTHER *v.* THE LEE CONSERVANCY BOARD.

Ancient navigable River—Action against Conservators—Public Purposes—Conservators of River not Liable for Obstruction to Navigation.

The defendants were an unpaid body of trustees created by statute conservators of the Lee, an ancient navigable river, and were "authorized and empowered from time to time at their discretion to cleanse, scour, deepen, enlarge or straighten the channel or course of the said river, and also to set out, open, make and maintain" certain new cuts or canals thereinafter specified, to communicate with the river and to be used for the navigation, "and also to remove all obstructions and impediments whatsoever to the said navigation." The defendants were also by statute empowered to levy rates or tolls for the use of certain locks and artificial cuts, but were expressly forbidden to receive any toll in respect of such part of the navigation as was between Bow Creek and Old Ford Lock, which part of the navigation was an ancient highway, and was by statute declared to be for ever free from toll.

The plaintiffs' barge, while navigating a part of the river between Bow Creek and Old Ford Lock, struck upon one of several submerged piles and was injured. The plaintiffs having brought an action for damages, the jury found that the piles were dangerous; that the defendants ought to have been aware of the danger, and had neglected their duty:—

Held, by Pollock, B., that the action could not be maintained, since the defendants were unpaid trustees appointed for public purposes in aid of the common law right of navigating an ancient highway, and the duty of removing obstructions imposed by the statute was discretionary and not compulsory.

THE action was tried before Pollock, B., on the 6th of November, 1878, and heard, on further consideration, on the 4th of December, 1878, when the judgment was reserved.

The facts proved at the trial and the arguments appear from the judgment.

A. Charles, Q.C., *Lumley Smith*, and *Brooke Little*, for the plaintiffs.

J. Brown, Q.C., *R. E. Webster, Q.C.*, and *St. Aubyn*, for the defendants.

Jan. 25. 1879. The following judgment was delivered by

POLLOCK, B. The plaintiffs in this action are the owners of the barge *Globe*. The defendants are the Lee Conservancy Board, who have been appointed by statute conservators of the River Lee and the cuts and works connected therewith. The

1879

FORBES v. LEE CONSERVANCY BOARD.

action is brought to recover damages for an injury which the plaintiffs' barge and its cargo received whilst navigating the River Lee in January, 1878, by reason of its striking upon a pile which projected above the bottom of the river, whereby the barge sank and its cargo was injured. The trial took place before me during the last sittings for Middlesex, when the jury found a verdict for the plaintiffs for the agreed amount of 582*l.* 14*s.*, and answered certain questions which I put to them with a view of determining, after argument, the legal rights of the parties.

From the evidence adduced at the trial for the plaintiffs and the defendants, it appeared that the place where the barge met with the injury is near to Five Bells Bridge, and a portion of the natural course of the River Lee between Bow Creek and Old Ford Lock, which is an ancient and navigable stream in respect of which the defendants, although they have rights given them by statute, cannot levy any toll from boats or barges using it, and of which they are neither owners nor occupiers. The pile against which the plaintiffs' barge struck had been placed in the bed of the river many years ago. The date of its being so fixed could not be ascertained, and its existence was unknown to the defendants or their agents until October, 1877, when Chamberlain, a lighterman, having to discharge a number of lighters at a wharf near to the pile, obtained the permission of the defendants' engineer to lower the water so as to see whether the bottom of the river was in a safe condition should barges take the ground. This accordingly was done, and the pile in question and several others were found projecting, and were cut level with the bottom by men employed by Chamberlain. After this several barges lay aground there in safety, but heavy floods having occurred the bottom of the river was scoured to a lower level, and the piles again projected. What was done in October, 1877, was known to the water bailiff and engineer of the defendants, but they considered that this part of the river bed was within the district of the Poplar Board of Works, and that the Poplar Board were bound to keep it in good order. No evidence was given which shewed whether this opinion was correct or otherwise.

At the close of the plaintiffs' case, counsel for the defendants submitted that no duty had been shewn to exist whereby the

1879

FORBES v. LEE CONSERVANCY BOARD.

defendants were bound to remove the pile complained of. I thought the question so doubtful that the better course would be to hear the case for the defendants and then take the opinion of the jury upon any questions of fact which arose. Accordingly, after the defendants' witnesses had been examined, I summed up, reading to the jury the section of the statute upon which the alleged duty of the defendants was said to exist, to the language of which I will shortly call attention, and left to them the following questions, the answers to which are appended:—

1st. Assuming it was the duty of the defendants to remove all obstructions and impediments to the navigation, were the piles at the time of the accident dangerous? Answer, "Yes."

2nd. Were the piles so likely, before then, to become dangerous that the defendants ought to have been aware of the danger? Answer, "Yes."

3rd. Did the defendants neglect their duty? Answer, "Yes."

Upon these findings I reserved judgment until after argument of the questions of law; these were very fully and ably presented to me during the last sittings; the conclusion at which I have arrived is, that taking the facts as proved and the findings of the jury based upon them, the defendants are entitled to judgment.

The River Lee, which flows from the town of Hertford to the River Thames, is an ancient navigable river. Statutes have passed from time to time whereby powers have been given to trustees for preserving and improving the navigation; and by the Lee Conservancy Act, 1868 (1), s. 62, all the powers, authorities, and rights of the trustees are vested in the defendants.

The earliest statute which need be noticed for the purposes of the present case is the 7 Geo. 3, c. 51, which provides for the preserving and improving the navigation of the River Lee, and also for the making of new cuts, canals, and other works in connection therewith. Sect. 1 of that Act, after appointing as trustees a large body of gentlemen, including the Lord Mayor and Aldermen of the city of London, and the Mayor and Recorder of Hertford, contains a provision upon which the plaintiffs chiefly rested their case. It is as follows:—

"The said trustees, or any five or more of them, shall be, and

(1) 31 & 32 Vict. c. cliv.

they are hereby authorized and empowered from time to time, at their discretion, to cleanse, scour, deepen, enlarge, or straighten the channel or course of the said River Lee, and also to set out, open, make, and maintain, all or any of the new cuts or canals hereinafter specified and described to communicate with the said River Lee, and to be used for the said navigation; and also *to remove all obstructions and impediments whatsoever to the said navigation.*"

The plaintiffs contended that this provision gave a power to and imposed a duty upon the defendants to remove the pile which caused injury to their barge and her cargo. The defendants admitted that such a power was conferred upon them, but denied that any duty was imposed beyond the doing of that which, according to their discretion, they might from time to time deem necessary or proper.

Before I consider which of these two contentions is correct, it will be well to notice more closely what was the plaintiff's precise cause of action, and also what was the position of the defendants under the statutes. The plaintiffs complained not of any wrongful act or misfeasance committed by the defendants, but of a neglect of a supposed duty arising out of their position as conservators under the Act, and but for the intervention of the legislature it is clear that at common law had an obstruction or impediment to the navigation arisen at the place where the pile existed, those who navigated the river would have been without remedy, except against the parties who caused the obstruction. Looking next to the legislation affecting the matter, I find that by none of the many Acts which have been passed dealing with the navigation, is the bed of the river or any part of it vested in the trustees or the conservators, so that they are in no sense owners of the river or navigation, but are an unpaid body of trustees appointed for public purposes in aid of the common law right of navigating an ancient highway.

Further, by s. 69 of 7 Geo. 3, c. 51, the navigation is declared to be a free navigation, subject to the payment of certain rates which are provided for by s. 80, and all of which are referable to the user of the locks and artificial cuts where they are collected, and the Lee Conservancy Act 1850 (1), s. 45, expressly provides

(1) 13 & 14 Vict. c. cix.

1879

FORBES v. LEE CONSERVANCY BOARD.

that the trustees shall not demand or receive any toll in respect of such part of the navigation as is between Bow Creek and Old Ford Lock, but the use of that part of the navigation is for ever, and notwithstanding any alteration or works to be made by the trustees of or in the same, to continue to be wholly free from all toll.

Under these circumstances, therefore, it becomes necessary to consider what is the true construction of s. 1 of the Act of Geo. 3. Are its provisions compulsory, or do they merely vest a discretion in the trustees? The words used are "authorized and empowered from time to time at their discretion," and this clearly governs all that follows, including the power to make and maintain all or any of the new cuts or canals which, according to all reason and authority (see *York and North Midland Ry. Co.* v. *Reg.* (1); *Great Western Ry. Co.* v. *Reg.* (2)), is clearly discretionary and not compulsory, and also the power "to remove all obstructions and impediments whatsoever to the said navigation." Unless some good reason for holding otherwise is shewn to exist, the language in itself would appear to create a discretionary and not a compulsory power, and at the close of the section the trustees are empowered "generally to do and perform all acts, matters, and things which the trustees, or any five or more of them, shall think necessary for the making, extending, improving, and maintaining the said navigation," implying as plainly as language can express a discretion.

Moreover, it should be noticed, in accordance with an undoubted rule of construction, that when the same statute imposes a duty on the trustees as to which no discretion is left to them, very different language is employed. Thus by s. 20, in order to secure the free navigation of the river during the progress of the works authorized by the Act, the trustees are "*required* to cause the said river to be kept navigable."

There is abundant authority to shew that when a statute gives an authority to do an act which the public interest demands, especially where judicial functions are created, words which would seem to give merely an option should be so construed as to confer a duty, but in the cases illustrating this principle the rule has been

(1) 1 E. & B. 858; 22 L. J. (Q.B.) 225. (2) 1 E. & B. 874.

acted upon only where the general object and intention of the Act are best supported by so holding. In the present case it may truly be said that one great object of the Act was to keep the navigation free from obstructions and impediments, but there still remains the question who are the persons who are to decide what is an obstruction or impediment, and when and in what manner and at what cost they are to be removed? Extreme cases may be put on either side. On the one hand it may be said, if a vessel were to sink in the river so as wholly to obstruct all navigation, are not these conservators bound to remove it, and should they fail to do so, are they not liable in damages to any one who, whilst using the navigation, suffers therefrom? On the other hand it may be asked what discretion can the conservators be properly said to possess if they are bound at all times, irrespective of other claims upon their funds, to remove at great cost that which first an individual barge owner, and afterwards a jury, may pronounce to be a dangerous obstruction? The fair result of what can be said upon both sides of the question appears to me to be this: that the legislature has, partly for the purpose of the construction of new cuts and partly for the purpose of maintaining the navigation of an ancient navigable river, created a body of trustees without giving them any property in the river, or right to levy tolls for the use of it, and has vested in this body large and important powers, including the power at their discretion to remove obstructions and impediments to the navigation, and that although the trustees would be responsible in damages to one injured by any misfeasance committed by them, or by any non-feasance where the duty imposed was imperative, they are not liable where the matter in respect of which the non-feasance is alleged is one which comes within the scope of their discretion, and as to which they are the persons whose express duty it is to say whether the act should or should not be done.

It might be said that in the present case it was not shewn by the defendants that they had ever exercised any discretion, or, indeed, taken the matter into their consideration. This point was not made by counsel, nor does the statement of claim raise it. (1)

(1) Paragraphs 5 and 6 of the claim were as follows: 5. The defendants were, under the Lee Conservancy Act, 1868, and sundry other Acts, bound to

1879

FORBES v. LEE CONSERVANCY BOARD.

Were a statement of claim to allege that the attention of the defendants had been called to a dangerous obstruction, and they had declined to meet and consider as to its removal, it might disclose a good ground for a mandamus requiring the board to proceed, but in such a case it is difficult to see how the plaintiffs could recover any damages.

It was suggested by counsel for the plaintiffs, though not much pressed, that one mode of giving effect to the words "at their discretion" would be by holding them to refer, not to the removal or non-removal of an obstruction, but to the mode of removal. I cannot, however, find any ground for so cutting down what is the plain meaning of the words, and to do so would, in my judgment, be giving an artificial effect to them which cannot be justified. It would, moreover, suppose the legislature to have used the words without any need, for had they been omitted it is clear that the trustees are the only persons who could direct how any obstruction should be removed.

Several authorities were cited by the plaintiffs' counsel. The earliest in date was *Parnaby* v. *Lancaster Canal Company*. (1) The plaintiff in that case was the owner of a fly-boat, and brought his action against the defendants, who were owners of a canal, and by their Act were entitled to levy tolls upon boats navigating it, and had power to remove any boat obstructing the navigation. The plaintiff alleged that they had failed to remove a boat which had sunk and obstructed the navigation, whereby the plaintiff's boat struck against it, and was damaged. The plaintiff contended for the liability of the defendants upon two grounds, first, That they were liable by reason of the clause in their Act, by which they were empowered, and therefore it was argued, bound to remove the sunken boat; and secondly, That a duty attached to the defendants at common law to make good the navigation of the

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preserve and maintain the navigation of the River Lee, but they negligently, carelessly, and wilfully neglected to preserve and maintain the same, and negligently allowed the said piles to project into the bed of the river as aforesaid.

6. The defendants had notice before the said injury that the said piles were where they were, and were dangerous to the navigation, but they did not remove them nor warn the plaintiffs against them.

(1) 11 A. & E. 223.

canal, whilst they exacted tolls for their benefit. The Courts of Queen's Bench and Exchequer Chamber decided in favour of the plaintiff upon the latter ground, the Court of Queen's Bench saying that the case is not like that of public officers who derive no benefit: "The present defendants on the contrary invite the whole public to navigate on their canal in consideration of the tolls paid;" and further likening the case to that of a shopkeeper who leaves a trap-door open in his shop. The Court of Exchequer Chamber also say, "The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company, and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." As to the first ground the decision was in favour of the defendants, the Court of Exchequer Chamber saying, "The principal objection in this case was, that the clause recited in the declaration and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or a permissive clause only. And we are all of that opinion. Neither the clause recited, nor anything in the Act of Parliament contained, imposes such a duty upon the defendants below, and the allegation in the declaration as to the duty of the company seems to have been founded on a mistake as to the true meaning and effect of that clause."

In *Mersey Docks Trustees* v. *Gibbs* (1), the House of Lords decided that the trustees were liable for negligently allowing a bank of mud to remain at the entrance of their dock, but in so holding the judgment was based upon the principle acted upon in *Parnaby* v. *Lancaster Canal Co.* (2), the Lord Chancellor (Lord Cranworth) saying that the only difference between that case and the one before the House was that in the latter the trustees did not collect tolls for their own profit, but merely as trustees for the benefit of the public, which did not, in his opinion, make any difference in principle in respect to their liability; and I find

(1) Law Rep. 1 H. L. 93. (2) 11 A. & E. 223.

1879

FORBES v. LEE CONSERVANCY BOARD.

nothing, either in the opinions given by the noble and learned Lords who took part in that case, or in that of the judges who were called in, to shew that they disapproved of that portion of the judgment of the Court of Exchequer Chamber in *Parnaby* v. *Lancaster Canal Co.* (1), which negatived any liability of the defendants based upon the language of their Act.

The tendency of the opinion of the judges in *Mersey Docks Trustees* v. *Gibbs* (2) is no doubt to limit the effect of some of the decisions whereby trustees and commissioners of public works have been shielded from the result of their negligence, and there is great weight in the observation that "it is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause;" but to this is added, "though the legislature can, and no doubt in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes." (3)

The position of the present defendants, who have no property or pecuniary interest in the old River Lee, and the language of their Act, are very different to those which existed in the case last cited. Moreover, it is to be noticed that in all the cases which are carefully collected and commented upon in the opinion of the judges, not only were the defendants persons incorporated for the express purpose of constructing and carrying out particular works essential to the expressed object of the legislature, but the injuries in respect of which damages were sought arose from an act of commission or omission connected with such works; whereas here, so far as the ancient course of the River Lee is concerned, it does not appear from the Act that any new works were to be executed, or that except in the discretion of the trustees anything whatever was to be done. In the more recent case of *Winch* v. *Conservators of the Thames* (4), in which the defendants were held liable for the non-repair of the towing-path adjoining the River Thames, the judgment proceeded upon the same principle as was acted upon in *Mersey Docks Trustees* v. *Gibbs* (2); the majority of the Court of Exchequer Chamber saying: "We think

(1) 11 A. & E. 223.
(2) Law Rep. 1 H. L. 93.
(3) Law Rep. 1 H. L. 110.
(4) Law Rep. 9 C. P. 378.

it is enough to support this verdict if the defendants were, so long as they kept the towing-path open and took toll for its use, under an obligation to those whom they invited to use it to take reasonable care to see that the towing-path was in such a state as not to expose those using it to undue danger." Before quitting the cases which bear upon this part of the case I ought to allude to *Hartnall* v. *Ryde Commissioners* (1), in which the defendants, who were improvement commissioners, were held liable for non-repair of a footway which was a highway; and *Ohrby* v. *Ryde Commissioners* (2), where the defendants were held liable for not properly fencing a footway. But on reference to these cases and the statutes upon which they are founded, it will be seen that in the first the defendants were substituted for the parish as to the repair of highways within their district, and by the neglect complained of had, according to the express provision of their Act, committed a misdemeanour. In the second the language of the Act, by which the defendants were constituted and their duties defined, was clearly imperative. On the other hand, in *Parsons* v. *St. Matthew, Bethnal Green* (3), where the words of the statute, under which it was sought to make the defendants liable, were, "it shall be lawful for every vestry to repair," the Court said this gave the defendants a discretion, and therefore they were not liable for non-repair of a highway. The case of *Re Newport Bridge* (4) is to the same effect.

Thus far I have been led both by principle and authority to the conclusion, that there is no such obligation laid upon the defendants by statute as makes them liable for the non-removal of the obstruction complained of, and in dealing with this part of the case it has, I think, been made also to appear that the position of the defendants is such that no common law liability can be inferred. But before I so hold, I would notice an argument which, were it well founded in fact, would certainly be entitled to great weight. It was said on behalf of the plaintiffs that although the particular place where the plaintiffs' barge was injured was a portion of the old River Lee, the navigation of which was expressly exempt from

(1) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(2) 5 B. & S. 743; 33 L. J. (Q.B.) 296.
(3) Law Rep. 3 C. P. 56.
(4) 2 E. & E. 377; 29 L. J. (M.C.) 52.

1879

FORBES v. LEE CONSERVANCY BOARD.

toll, the statutes must be read together, and that their intention was to deal with the whole navigation as one entire subject-matter as to which the trustees must be treated as proprietors, and that although the right to take tolls is confined to the new cuts and locks, it is taken for the benefit of and to be expended upon the whole navigation, whether new or old. I have carefully considered the defendants' Acts with a view to see whether any true foundation for this argument exists, but so far from finding any it appears to me that an intention is clearly shewn throughout to preserve the legal status of the old River Lee, and the right of the public to navigate it intact; and this is only what would be expected where the legislature was dealing with an ancient highway navigable at all times and by all persons.

This contention must therefore fail. The conclusion at which I have arrived makes it unnecessary to enter upon the consideration of a question which was argued before me, and has been much discussed in many of the cases, namely, whether the funds of the defendants derived from their tolls are applicable to the satisfaction of damages in an action such as the present. The result of this conclusion is that, notwithstanding the findings of the jury, no legal cause of action has been established, and judgment must be entered for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Thomson, Son, & Brooks.*
Solicitor for defendants: *R. J. Pead.*

WEBSTER *v.* PETRE AND OTHERS. 1879 *March* 11.

Principal and Surety—Discharge of Surety—Subsequent Legislation affecting Indemnity—Effect on Liability of Surety—Abandonment of Railways Act, 1850 (13 & 14 *Vict. c.* 83), *s.* 31—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 31, 32.

The plaintiff gave a bond to the Crown conditioned to be void if a certain railway was completed within a given time, and the defendants undertook to indemnify the plaintiff against all liability which he might incur in giving such bond. The railway was not completed, and the plaintiff, under the Railway Companies Act, 1867, which was passed after the giving of the bond, applied to the Board of Trade to authorize the abandonment of the railway and to cancel the bond, which was ordered upon condition that the money secured by it should be applied as assets of the company. The company was accordingly wound up, and the plaintiff paid, under an order of the Court, a part of the money secured by the bond, which was then cancelled. The plaintiff brought an action to recover the amount so paid from the defendants on their undertaking to indemnify. On demurrer to the statement of claim:—

Held, that the payment made by the plaintiff to obtain the cancelling of the bond was a liability incurred by him in giving the bond, for which the defendants were liable to indemnify him, although the Railway Companies Act, 1867, enabling the plaintiff to take proceedings to cancel the bond was not passed when the indemnity was given.

DEMURRER to a statement of claim, the material parts of which were as follows:—

3. On the 30th of June, 1865, the plaintiff and the defendants and certain other persons, being mutually interested in the passing of a bill through Parliament authorizing the construction of the South Essex Railway, entered into an agreement by which the plaintiff, on the one hand, undertook, amongst other things, to pay a sum of 800*l.* towards the parliamentary expenses incurred in obtaining the Act, and immediately after the Act was obtained to give the necessary bond with sufficient sureties to the Treasury to release the parliamentary deposit; and the defendants, on the other hand, together with certain other persons mentioned in the schedule to the agreement, jointly and severally undertook to indemnify the plaintiff and his sureties against all liability which he or they might incur in giving the said bond to the Treasury to the extent of 10,000*l.*

4. The plaintiff did accordingly pay the sum of 800*l.*; and

1879

WEBSTER v. PETRE.

on the 20th of July, 1865, he and one Frederick Doulton as his surety entered into the agreed bond, by which they became bound to her Majesty the Queen in the penal sum of 40,000*l*. The bond was conditioned to be void if the South Essex Railway Company should, within the time limited for the completion of the railway, either open the railway for the public conveyance of passengers, or prove to the satisfaction of the Lords of the Committee of her Majesty's Privy Council for Trade and Foreign Plantations, that the company had paid up one-half of the amount of capital by the South Essex Railway Act authorized to be raised by means of shares, and had expended for the purpose of the Act a sum equal in amount to such one-half of the capital, or should pay to her Majesty, or her heirs or successors, the full sum of 20,000*l*.

5. None of the conditions of the bond were ever fulfilled, and on the 31st of December, 1873, the time limited for the completion of the railway having long previously expired, the plaintiff being liable under the bond, and being prevented from disposing of his property by reason of such liability, applied, in pursuance of the Abandonment of Railways Act, 1850, and the Railway Companies Act, 1867, to the Board of Trade to issue their warrant authorizing the abandonment of the railway, and to cancel the bond.

6. On the 9th of May, 1874, the Board of Trade granted the application, but upon condition that the money secured by the bond should be applied as part of the assets of the company.

7. On the 3rd of July, 1874, the company was ordered to be wound up by the Court of Chancery under the provisions of the Abandonment of Railways Act, 1869; and on the 3rd of November, 1875, upon the application of the official liquidator of the company, the plaintiff was ordered to pay into court the sum of 750*l*. (which was estimated as a sufficient sum) as assets of the company, and liberty was given to the official liquidator of the company, upon payment being made of such sum and upon the plaintiff undertaking to make good any further sum that might be required, to apply to the Treasury to have the bond assigned to him to be cancelled. In pursuance of this order the plaintiff, on the 14th of December, 1875, paid the sum of 750*l*. into court, and gave the undertaking, and the bond was afterwards cancelled.

1879

WEBSTER v. PETRE.

8. On the 18th of March, 1878, upon the application of the plaintiff, it was ordered by the Court that a sum of 258*l.* 4*s.* 5*d.*, less certain costs of the official liquidator, should be paid out to the plaintiff as the part remaining and not required as assets of the company of the sum of 750*l.*; and the plaintiff afterwards, on the 21st day of May, 1878, received under this order the sum of 233*l.* 8*s.* 3*d.* The plaintiff thus had to pay, in consequence of his liability under the bond the sum of 516*l.* 11*s.* 9*d.*, and lost the interest thereon at 5 per cent. from the 14th of December, 1875, to the 21st of May, 1878, amounting to 91*l.* 4*s.* 7*d.*

The plaintiff claimed 607*l.* 16*s.* 4*d.*, and interest thereon from the 21st of May until judgment.

One of the defendants, George William Hemans, demurred to the whole of the statement of claim, on the ground that the arrangement entered into between the plaintiff and the Board of Trade, referred to in the 5th and 6th paragraphs of the statement of claim, constituted a material variation in the risk against which he agreed to indemnify the plaintiff, and that it did not appear that the arrangement was entered into with his knowledge or consent.

Joinder in demurrer.

Gainsford Bruce (*F. Radcliffe*, with him), for the defendant. This is a contract to indemnify the plaintiff on the bond that has not been enforced, and the plaintiff has incurred no loss under the bond. What was paid was in pursuance of a voluntary arrangement outside the bond. Further, the Act under which the arrangement was made was passed after the bond was given. The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 31, only gave power to a shareholder to petition for the winding-up of the company. The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 32 (1), gave power to make the application that was made in this case, and s. 31 enables the Board of Trade to make it a condition that the money deposited shall be applied as part of the assets of the company. But this Act was passed after the bond was given, and there is therefore nothing to take the case out of the ordinary rule of law that a surety's position cannot

(1) Amended by the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114).

1879

WEBSTER v. PETRE.

be altered without his consent, no matter whether the new liability is less or more onerous: *Holme* v. *Brunskill.* (1)

Webster, Q.C. (*Bray* with him), for the plaintiff. The defendant undertook to indemnify the plaintiff against all liability which he might incur in giving the bond to the Treasury, and the appropriation of part of the money as assets of the company in the winding-up is such a liability. The defendant has not pleaded that the steps taken by the plaintiff were improper, but relies on there being no cause of action. The parties, however, are bound by legislation subsequent to their agreement. The Railway Companies Act, 1867, was a remedial Act, as before it there was no mode of getting rid of the liability on the bond. If a third person, a creditor for instance, had applied, the plaintiff would have been bound by the order of the Board of Trade, and it cannot make any difference that he himself has taken advantage of the provisions of the Act. In either case the liability has been incurred in giving the bond, and the plaintiff is entitled to recover on the indemnity. [He cited *Smith* v. *Howell* (2), *Warwick* v. *Richardson* (3), *Ranelaugh* v. *Hayes* (4), *Broughton's Case* (5), and *Wooldridge* v. *Norris.* (6)]

Gainsford Bruce, in reply. In the cases cited there was a primary liability, and not as here a liability as surety only. The distinction is clearly expressed in *Pitt* v. *Purssord.* (7) The question here is whether the defendant's position as surety has been altered without his consent. [He also cited *Parker* v. *Lewis* (8), and *Warre* v. *Calvert.* (9)]

POLLOCK, B. This is a case not without difficulty, in part by reason of the novel character of the circumstances under which the cause of action is alleged to have arisen—circumstances that could not have occurred but for the passing of the Railway Companies Act of 1867. Upon the part of the defendant it is said that the plaintiff had no right to make the payment with which he seeks to charge the defendant in this action.

(1) 3 Q. B. D. 495.
(2) 6 Ex. 730.
(3) 10 M. & W. 284.
(4) 1 Vern. 189.
(5) 3 Co. Rep. pt. 5, 23 b.
(6) Law Rep. 6 Eq. 410.
(7) 8 M. & W. 538.
(8) Law Rep. 8 Ch. 1035.
(9) 7 A. & E. 143.

1879

WEBSTER v. PETRE.

In the solution of this case I think I must look at the substance of the defendant's undertaking on the indemnity; no doubt Mr. Bruce is perfectly right in saying, if I am to treat this which occurred and which led to the payment of this sum of money as an alteration or variation of that liability which the defendant originally came under by reason of the contract declared upon, then, there having been no consent by the defendant, there not having been even any notice of the steps that were being taken, the defendant was discharged, and cannot be made liable for that which the plaintiff has done; and for that the recent case in the Court of Appeal of *Holme* v. *Brunskill* (1) is an amply sufficient authority. Let us see, however, what is the real effect of this undertaking, and what followed upon it. The undertaking stated is: "That the defendants jointly and severally undertake to indemnify the plaintiff and his sureties against all liability which he or they might incur in giving the said bond to the Treasury to the extent of 10,000*l*." It is not an undertaking to indemnify the plaintiff against any amount which he may be called upon to pay to the Treasury, it is an indemnity of a wider kind, because apt and proper language could easily have been used to express the former; but what is expressed is this, "all liability which he or they might incur." It is quite true that any liability for which the plaintiff seeks to make the defendant liable must come fairly and substantially within these words, but if it does, any objection that the course pursued by the plaintiff was not the proper course, but one open to objection as prejudicial to the interests of the defendants, should come by way of answer and should be averred in the statement of defence. Those being the words of the indemnity, let us see what happened. None of the conditions of the plaintiff's bond to the Treasury were ever fulfilled, and as the time limited for the completion of the railway expired, it is quite clear that the plaintiff was bound and liable to pay the sum in the bond; and had he paid it the defendants would have been liable to indemnify him. Further, it is not a matter to be lost sight of that the plaintiff was prevented from dealing with his property by reason of such liability, because this, being a bond to the Crown and not a mere bond to the subject, was

(1) 3 Q. B. D. 495.

1879

WEBSTER v. PETRE.

binding on his lands. That being so, the money being due, what is it that the plaintiff does? He avails himself of the means that are given by this statute, the Railway Companies Act, 1867, to do what? Not, in my opinion, to alter or vary his liability as if he had shifted it to some other form of liability or had come under some fresh liability which would have been different from that which the defendant undertook; but he does that which enables him to determine this question as to the payment of this sum of money. It is as if a man having a bond to pay, and being liable to pay 1000*l.*, had been told, "If you will appear upon a particular day and pay the sum of 100*l.* instead of 1000*l.* at the Bank of England, you shall be free." If that were done, I should say it was not creating a new obligation, but rather availing himself of the means of getting rid of his liability, in the same way as a man does who goes through the Bankruptcy Court instead of paying his creditors 20*s.* in the pound. Reverting to the words of the indemnity, "against all liability which he or they might incur in giving the said bond to the Treasury," it seems to me that the payment made by the plaintiff may fairly be said to have been a liability incurred in giving the bond. If there are any facts which shew that this is not so, they must come from the defendants by way of statement of defence.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hargrove & Co.*
Solicitors for defendant: *Radcliffe & Co.*

BOUCH *v.* THE SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY COMPANY.

1879
March 17.

Attachment of Debts—Garnishee—Common Law Procedure Act, 1854, s. 61—*Interest on Railway Stock guaranteed by Garnishee.*

The defendants raised money by the issue of capital stock to complete a portion of their line. By an arrangement between the defendants and the D. Railway Company, confirmed by an Act of Parliament, the line was worked by the latter company, who provided and paid to the defendants half-yearly a sum of money for the payment of interest on the stock. Judgment having been recovered by the plaintiff against the defendants and one of the half-yearly instalments being due:

Held, that it could be attached in the hands of the D. Railway Company as a debt under the Common Law Procedure Act, 1854, s. 61.

SPECIAL CASE.

The plaintiff having obtained judgment against the defendants (hereinafter called the Sevenoaks Company), applied at chambers for an order to attach all debts due to the defendants from the London, Chatham, and Dover Railway Company (hereinafter called the Dover Company). On the hearing, the Dover Company attended and admitted that they held a sum of 4750*l.*, payable under the terms of arrangement hereinafter mentioned, and professed themselves to be willing to abide the order of the Court; but the Sevenoaks Company and certain of their stockholders, represented by George Herbert Pember, also appeared, and claimed that the amount so held by the Dover Company could not be attached to answer the judgment debt. An order was made that a special case should be stated between the judgment creditor on the one hand as plaintiff, and the Sevenoaks Company and George Herbert Pember, on behalf of himself and others, the stockholders, on the other hand as defendants. A case was accordingly stated, which, so far as is material, was as follows.

1. On the 3rd of June, 1872, the Sevenoaks Company entered into an arrangement under seal with the Dover Company for the purpose of providing for the construction of a line of railway from Otford to Maidstone, in the county of Kent, forming a separate section of the undertaking of the Sevenoaks Company, and called

1879

BOUCH v. SEVENOAKS RAILWAY CO.

the Maidstone Extension, which the Sevenoaks Company had been previously authorized to construct but had not constructed.

2. The deed of arrangement after providing that the Sevenoaks Company should forthwith construct and complete the line, that the Dover Company should work it when completed, and that the Sevenoaks Company should from time to time issue such an amount not exceeding 200,000*l.* of a certain authorized capital of 300,000*l.* as should be requisite for the construction of the line and for other specified purposes, provided further by clauses 4, 5, 6, 7, and 9, as follows:

"4. The Dover Company shall provide and, if need be, annually pay the sum of 9000*l.* for the payment of interest on the stock issued by the Sevenoaks Company in accordance with these terms, and such sum of 9000*l.* shall be payable and be paid from the day on which the Maidstone line shall be completed as aforesaid.

"5. The sum provided for by the last preceding clause to be from time to time provided and paid by the Dover Company (in these terms called the 'contribution of the Dover Company,') shall be deemed to become payable from day to day, but shall be paid at the same time as the interest on the Dover Company's Arbitration Debenture Stock is paid.

"6. The contribution of the Dover Company shall be a charge on the undertaking of the Dover Company next after the interest on their existing debenture stocks.

"7. The contribution of the Dover Company shall be repaid to them out of the net earnings of the Maidstone line, and any deficiency in that behalf of those earnings in any year, shall be a charge on the net earnings of that line in every subsequent year until the same is fully paid.

"9. The gross earnings of the Maidstone Line shall be applicable and applied in the manner and with the priorities following, and not otherwise:—

"(1.) In payment to or retention by the Dover Company, of the actual cost of working the same as hereinbefore provided.

"(2.) In repayment to or retention by the Dover Company, of their contribution, and of any sum or sums which may for

the time being be due to them under Article 7 of these terms.

"(3.) In payment of the residue then remaining to the Sevenoaks Company for their own benefit."

3. The arrangement was confirmed by an Act passed in the same year called "The Sevenoaks, Maidstone, and Tunbridge Railway Act, 1872," in the following terms:—

"The terms of arrangement set forth in the schedule to this Act are hereby confirmed, and the same shall be in all respects as fully as if the same were set forth at length and enacted in the body of this Act, binding on the company and their stockholders, and on the Dover Company, their debenture stockholders, creditors, preference stockholders, and ordinary stockholders, and shall be carried into effect."

4. The Act also contained in its 21st section, provisions for the realisation and distribution of the assets of the Sevenoaks Company in the event of its being wound up on the transfer (which was authorized by the Act) of its undertaking to the Dover Company, and enacted that subject to the payment or satisfaction of all their debts and liabilities, the company should pay and distribute its assets among its registered shareholders.

5. The 23rd and 24th sections provided that after the debts, liabilities, and engagements of the company, should be paid, satisfied, or discharged, and their net moneys distributed, the company should be dissolved, but that everything done before the dissolution should be as valid as if the dissolution had not happened, and should not be prejudiced or affected thereby.

6. The terms of arrangement were modified by the Sevenoaks, Maidstone, and Tunbridge Railway Act, 1873, to this extent that the sum of 200,000*l.*, hereinbefore referred to was increased to 211,000*l.*, and the sum of 9000*l.* was increased to 9500*l.*

7. Either party had liberty to refer to the Act of 1872, and to the terms of arrangement, and also to refer to the Act of 1873, and the Acts therein recited, and to 38 & 39 Vict. c. cciii., as if the same were incorporated in the case.

8. The deed of arrangement as so modified was carried into effect, and the Sevenoaks Company issued the prospectus herein-

1879

BOUCH v. SEVENOAKS RAILWAY CO.

after (so far as is material) set out, inviting subscriptions to the stock to the amount of 200,000*l.* :—

"Sevenoaks, Maidstone, and Tunbridge Railway Company,
"Extension from Otford to Maidstone,
"Part of working system of
"London, Chatham, and Dover Railway Company,
"Issue of 200,000*l.* stock.

"Guaranteed 4*l.* 10*s.* per cent. by London, Chatham, and Dover Railway Company, from the completion of the line, and entitled to 1*l.* 10*s.* per cent. additional interest from profits of line.

"The capital now to be raised under the Act of last session and the agreement with the London, Chatham, and Dover Company, confirmed by that Act, will be entitled in perpetuity to the payment of 4*l.* 10*s.* per cent. per annum by the London, Chatham, and Dover Company from the completion of the line. This guarantee which is absolute, and not dependent on the profits of the line itself, will rank after the arbitration and B debenture stocks of the London, Chatham, and Dover Company, not exceeding in the whole 5,999,000*l.*, and before its preference, capital and ordinary stock.

"This guarantee is therefore certain, and when payable on the completion of the line, the stock will yield 4*l.* 10*s.* per cent. for the payment of which an estimated gross receipt of 34*l.* per mile per week will suffice.

"The additional interest of 1*l.* 10*s.* per cent. has been attached to the stock by the Sevenoaks, Maidstone, and Tunbridge Railway Company, under the Act of last session, and will be payable out of the net earnings of the line, after payment and recoupment to the London, Chatham, and Dover Company, of working expenses, and the amount of the guaranteed interest paid by them.

"The guarantee as authorized last session is limited to 9000*l.*, or 4*l.* 10*s.* per cent. on a sum of 200,000*l.* In consequence, however, of the great increase in the price of material and cost of labour since the original estimate was made, the directors of the London, Chatham, and Dover Company, have by resolution agreed (subject to Parliamentary sanction and to the approval of their proprietors) to extend the guarantee for the completion of the

line by an additional 500*l.* per annum, so as to cover the sum of 211,000*l.*, and a Bill is now before Parliament for this purpose.

"The 200,000*l.* capital now to be raised will therefore be part of a sum of 211,000*l.*

"The money raised will be solely applicable to the completion of the line under the provisions of the Act of 1872."

The Dover Company caused to be published and circulated with the above prospectus a letter recommending the proposed issue of stock to the favourable consideration of their proprietors.

The stock and also the additional 11,000*l.* of stock were subscribed for and allotted on the terms set forth in the prospectus.

9. The stockholders are registered members of the Sevenoaks Company, having like qualifications and rights of voting with other members.

10. Ever since the completion of the line the Dover Company have, in execution of the deed of arrangement, every half year, viz. on the 15th of January and the 15th of July each year, paid to the Sevenoaks Company the sum of 4750*l.*, being half the sum of 9500*l.*; such payment has been made out of the profits of the Dover Company next after the interest on their debenture stock, by cheque payable to the Sevenoaks, Maidstone, and Tunbridge Railway Company, or order.

The Sevenoaks Company, upon receipt thereof, have, after indorsing the same, paid it into an account at their bankers opened in the names of two directors of the Sevenoaks Company, by whom the same has been transferred to another wholly separate and distinct account at the bankers entitled the "Interest Warrant Account," from which the interest warrants were paid by the bankers to the stockholders in respect of the stock.

11. On the 16th of July, 1878, when the garnishee order was served, one of the half-yearly payments of 4750*l.* was due and payable by the Dover Company to the Sevenoaks Company (viz. on the 15th of July, 1878), and a cheque had actually (viz. on the 10th day of July, 1878) been drawn and signed ready to be paid to the Sevenoaks Company, but it had not been handed to them. In consequence of these proceedings and the orders herein this cheque was afterwards cancelled.

12. According to the accounts as rendered by the Dover

1879

BOUCH v. SEVENOAKS RAILWAY CO.

Company there had never been any surplus earnings payable by the Dover Company to the Sevenoaks Company, or to the stockholders over and above the annual sum of 9500*l.* The earnings in respect of the Maidstone extension, after providing for the working expenses for the half year ending the 30th of June, 1878, according to the accounts, amounted to 230*l.* 5*s.* 10*d.*; and the whole earnings, after providing for working expenses, since the opening of the line in June, 1874, to 2624*l.* 10*s.* 9*d.*

The question for the opinion of the Court was whether the sum of 4750*l.*, or any part thereof, was on the 16th of July, 1878, liable to be attached by the judgment creditor to answer the judgment debt?

Webster, Q.C. (*Bray* with him), for the plaintiff. The Act sanctions an arrangement between the two railway companies, and as between the preference and other shareholders of the Sevenoaks Company it is binding, but it does not create debenture holders or mortgagees, and does not, therefore, affect the rights of creditors. [He referred to *In re Stuart's Trusts.* (1)]

Herschell, Q.C. (*Jeune*, with him), for the defendants and other parties interested. These shareholders subscribed for this stock on the footing that the dividends should not depend on the earnings of the Sevenoaks Company, but on the credit of the Dover Company. The latter might have paid the dividend direct to the holders of the stock, but they pay it to the Sevenoaks Company for convenience of distribution, and a trust attaches to it under the Act of Parliament in the hands of the Sevenoaks Company, and it cannot be attached.

Webster, Q.C., in reply.

KELLY, C.B. This case is by no means free from difficulty, but I have come to the conclusion that this money is attachable by the judgment creditor.

When we look not merely to the terms of the Act of Parliament, but to the whole case, nothing can be more clear than that this money is payable, in the first instance, to the Sevenoaks Company, and they, on receiving it, indorse the cheque or order

(1) 4 Ch. D. 213.

for the payment of the money, and pay it into their bankers to the use of the holders of this stock. But before they can thus dispose of it, and before the payment into any bankers, or into the hands of any person or persons, to the use of the stockholders, they must themselves have the money.

Now, if the transaction takes place in this way that the Dover Company or their agent, or some officer of their company, comes and lays the money in bank notes upon a table in the office of the Sevenoaks Company, if nothing more occurs the Sevenoaks Company will pay it over to the holders of this stock. But before that takes place, and while the money is lying upon their table, what is there upon the agreement or the Act of Parliament which is before us to deprive a creditor of the right to come and take in execution the very bank notes which are lying upon his debtor's table? If so, he has equally the right, if the money be about to be paid over, but has not yet been paid over, to an execution under his judgment, and to claim the money by attachment, and consequently I am of opinion that this attachment should succeed.

Now, as to the arguments which have been urged for the defendants, that this money is impressed either with a trust or with a duty. It may be it is not a trust, and does not amount to a trust, but merely to a duty to pay it over according to the arrangement between the parties, but I cannot agree that the duty which is imposed upon the Sevenoaks Company to apply the money in question to a particular purpose, when we look to what that purpose is, should prevail over and supersede the right of the creditors, and compel the payment of the money over to the stockholders. There is a clear distinction in the legal rights of debenture holders and preference shareholders, and to hold that this money could not be attached, would be to hold that the two are in exactly the same position. It may be there is a duty here or that there is what may be called a security, it may also be called a direct order so to apply the whole of the money which the Dover Company pay over to the Sevenoaks Company, but a direction to do this cannot prevail against creditors who are no parties to any such arrangement.

I think, therefore, the right of the creditor must prevail, and that he can attach this money, and although the preference stock-

1879

BOUCH v. SEVENOAKS RAILWAY CO.

holders will, for a time be deprived of a portion of the money to which they are entitled, they are only in the condition of any ordinary preference shareholders in any railway company where there are debenture holders. The debenture holders must be paid first before anything else, for they have a charge upon the company and the company's property; but before the preference shareholders can defeat the claim of the creditors, there must be some express charge or assignment of the trust of the property in question which those preference shareholders are to receive. Here there is really nothing more than a guarantee and an agreement for the benefit of these preference stockholders that, in addition to the preference which they possess under the constitution of the railway company and the Acts of Parliament, they have the security of this undertaking on the part of the Dover Company to provide the Sevenoaks Company with the means of paying their preference stockholders the interest to which they are entitled. It is a cumulative remedy, a cumulative right which they possess, but I do not think that it can possibly prevail against creditors.

Under these circumstances our judgment must be in favour of the plaintiff.

HUDDLESTON, B. What we have to consider is this—whether in the hands of the Dover Company there is a sum of money due to the Sevenoaks Company which the plaintiff, as a judgment creditor, has the right to attach.

The Sevenoaks Company wanted to make the Maidstone line and for that purpose they entered into an arrangement with the London, Chatham, and Dover Company, and on the faith of that arrangement they issued this prospectus. The arrangement, ratified by Act of Parliament, was made, as appears by the first paragraph of the case, between the Sevenoaks Company and the Dover Company. Those were the two parties to the arrangement and no other persons, and under it the Dover Company were bound to provide and if need be annually pay the sum of 9500*l*. Now I stop for the moment and ask to whom were they to pay that? I apprehend it must be clear that they were to pay that to the Sevenoaks Company. They were to do this for the payment of interest on the stocks which were issued or were to be issued at

that time by the Sevenoaks Company in accordance with the arrangement. The public were to subscribe that sum of money on the security of the London, Chatham, and Dover Company, and it was pointed out to the public that it was a most advantageous investment, because the Dover Company undertook to pay half-yearly the sum of 4750*l.* in respect of the interest.

What is the position of those persons who have thus advanced their money? Mr. Herschell says first, they are in the position of cestuis que trust, and then he seemed to argue that they are persons who are entitled to have the money paid to them direct by the Dover Company. Their position certainly is not that of debenture holders. Mr. Herschell was bound to admit that they were preference stockholders. A preference stockholder is nothing more than a stockholder who is entitled to his dividend before any one else, and that was exactly their position. It is said that they are persons who are entitled to be paid their moneys as against a judgment creditor of the company. I must say I cannot assent to that proposition. They are shareholders or parties in a concern, taking, no doubt, priority over others, but still they are shareholders, and they are liable for the debts of the concern. Mr. Herschell says there is no debt at all that could be attached here. The answer to that is that the money is due upon the contract between the Dover Company and the Sevenoaks Company, and if the money is due from the Dover Company to the Sevenoaks Company by the agreement, and according to the course of practice applicable, an action might be brought. I cannot doubt, therefore, that the debt is due, and under these circumstances I agree with my Lord that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hargrove & Co.*

Solicitors for defendants: *Newman, Stretton, & Hilliard.*

1879
March 21.

GREGSON, APPELLANT; POTTER AND OTHERS, RESPONDENTS.

Tolls—Pier Company—Notice of Rate authorized to be taken—Power to vary Tolls.

A pier company were authorized by Act of Parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the Act, but they could only demand them so long as "the rates for the time being authorized to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent section power was given to lower the tolls or to raise them to such sums as the company should think proper, not exceeding the sums authorized by the Act. The company lowered some of the rates, but put up a board shewing the tolls contained in the schedule to the Act:—

Held, that the Act required the actual tolls in force for the time being, and not the maximum tolls authorized by the Act to be painted on the board.

CASE stated by justices.

At a petty sessions holden at Rochford, in the county of Essex, an information was preferred by the appellant, the clerk to the Southend Local Board, against the respondents, Ephraim Potter, George Hume, and George West, charging them with unlawfully resisting one William Joseph Chignell, a person employed in the due execution of an Act, 10 Geo. 4, c. xlix., entitled "An Act for making and maintaining a Pier at or near Southend in the parish of Prittlewell in the county of Essex, and for making convenient approaches to and from the same."

By this Act a company called "The Southend Pier Company" was formed for making and maintaining a pier or piers at Southend, and for other the purposes of the Act. And by s. 85 it is enacted:

"That from and after the time that the said piers or jetties, or either of them, shall be so far formed and completed that ships or vessels may be enabled to lade or unlade at or from the same respectively (such pier or jetty being not less than one hundred and fifty feet in length, and containing a surface of seven thousand five hundred square feet), every master of every ship, vessel, boat, or other craft who shall lade or unlade any goods, wares, or merchandize, shall pay to the said company the several rates or duties mentioned in the first schedule hereunto annexed, set down in figures against the same respectively." The first schedule

contains (inter alia) the following item: "For every thousand bricks 2*s*."

Sect. 95 enacts: "That the said company shall from time to time cause to be painted on boards and affixed and stuck up and continued and renewed as often as the same shall be obliterated or defaced, upon a conspicuous place or conspicuous places in or near the said proposed pier or piers, jetty or jetties, causeway or causeways, in large and legible characters, a list of the several rates or duties for the time being authorized to be taken as hereinbefore is mentioned in respect of the said proposed pier or piers, jetty or jetties, and causeway or causeways. And it shall not be lawful for the said company to demand or take, or cause to be demanded or taken, any of the rates or duties hereinbefore authorized to be taken in respect of the said proposed pier or piers, jetty or jetties, causeway or causeways, but during such time as the board so painted as aforesaid shall remain fixed as aforesaid."

Sect. 96 enacts: "That it shall and may be lawful for the treasurer, collector, or collectors, or any other person or persons authorized and deputed by the said company to go on board any ship or other vessel, to demand, collect, and receive the said duties and rates by this Act due and payable, and for non-payment to take and distrain every such ship or vessel, and all her tackle, apparel, and furniture thereunto belonging, or any part thereof, and the same to detain and keep until he or they be satisfied and paid the said rates and duties."

Sect. 130 enacts: "That the said company shall have full power from time to time at any annual or special general meeting to lower or reduce all or any of the tolls and duties hereby granted, but no reduction of any such tolls shall be made unless a majority of the proprietors present at such general meeting as hereinbefore directed shall assent thereto, and it shall be lawful for the said company in like manner again to raise the said tolls to such sum or sums as they shall think proper, not exceeding the sums hereby authorized to be taken."

Sect. 126 enacts: "That in case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this Act, every such person

1879

GREGSON v. POTTER.

shall for every such offence forfeit and pay any sum not exceeding 5*l.*"

By s. 3 of the Southend Local Board Act, 1875, 38 & 39 Vict. c. xxix., the local board of Southend were empowered to purchase the pier and undertaking formerly of the Southend Pier Company, and by s. 4 of the same Act it was enacted that, "On and from completion of the purchase the local board shall have and may exercise all the rights and powers formerly of the Southend Pier Company, except such of them as relate to that company's constitution or share or loan capital, and whatever might have been done by that company at a meeting general or special, or by their committee of management, may be done by the local board in their ordinary course of proceeding."

At the hearing of the information the following facts were admitted or proved:—

1. That the pier had been constructed, and was of the dimensions required by the Pier Company's Act, and that the purchase thereof by the Southend Local Board had been completed in the year 1875.

2. That a board with a table of rates or duties corresponding with the first schedule to the Pier Company's Act had been placed, and at the date of the alleged offence remained, affixed near the pier, and that in such table the rate or duty on bricks was stated to be 2*s.* per 1000.

3. That since the erection of the board the rate or duty on bricks had been several times altered under the authority of s. 130 of the company's Act, being at one time 1*l.* per barge load; afterwards 9*d.* per 1000; and ultimately, by a resolution of the local board duly passed shortly prior to the date of the offence charged in the information, raised to 1*s.* per 1000.

4. That no board painted with such altered rates or duties had ever been affixed pursuant to s. 95 of the company's Act, and no public notice by placard or otherwise was given of the raising of the rate or duty on bricks from 9*d.* to 1*s.* per 1000, but the before-mentioned board painted with the original rate or duty of 2*s.* per 1000, still remained affixed near the pier and was the only board purporting to contain any notice of the rates or duties payable under the Act.

1879

GREGSON v. POTTER.

5. That on the 8th of August last, two barges were loaded at the pier (within the limits of the Act) with bricks from a brick-field of which the respondent Potter was foreman.

That William Joseph Chignell, the duly appointed officer of the local board, demanded duty at the rate of 1s. per 1000, which the master of the vessels by Potter's direction, refused to pay, and tendered 9*d.* per 1000. That Chignell refused the sum tendered, and after reading to the respondents the section of the Act relating to obstruction of officers proceeded to distrain for the sum demanded, when the respondents Potter and Hume, with others acting under Potter's orders, forcibly resisted and prevented the levy, but it did not appear that any more force was used than was necessary to prevent the seizure. There was no evidence that West took any part in the transaction, nor even that he was present.

On these facts it was contended by the solicitor for the respondents, that the local board had not conformed to the provisions of the 95th section of the Pier Company's Act, inasmuch as they had not from time to time caused to be painted on boards and affixed near the pier a list of the rates and duties for the time being authorized to be taken, and that as Chignell was not acting in the due execution of the Act, in demanding and endeavouring to distrain for the altered rate or duty, the respondents were not guilty of forcibly resisting a person employed in the due execution of the Act. The justices dismissed the information against all the respondents.

The questions for the opinion of the Court were:

1. Was the maintenance of the board on which was painted a list of the rates or duties originally authorized by the company's Act, without any notice of the alterations from time to time made being affixed, a sufficient compliance with s. 95 of the company's Act?

2. Was the officer of the board in demanding and attempting to levy the altered rate or duty under the circumstances stated, employed in the due execution of the Act, and entitled to the protection of the 126th section?

Henry Matthews, Q.C. (*Edward Pollock*, with him), for the

1879

GREGSON v. POTTER.

appellant. The authorized rate or duty is that mentioned in the Act, and that must be what is referred to under the words of the 95th section "hereinbefore authorized to be taken." If this is not so any variation of rate in respect of one article would altogether deprive the company of the right to levy tolls until the notice was altered. Sect. 130 speaks of the sums authorized to be taken when referring to the maximum tolls set out in the schedule. [He also referred to the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 93, 95].

Prentice, Q.C. (*Channell*, with him), for the respondents, was not called on.

KELLY, C.B. The case before us has been very strenuously argued by Mr. Matthews, but he has not been able, in my opinion, to raise a reasonable, far less a substantial, doubt about the construction of this Act. The 85th section gives to the company "the several rates or duties mentioned in the first schedule hereunto annexed." If the Act of Parliament stopped there, there could be no doubt about the construction, and the public or persons loading or unloading goods at this place would pay for goods at the rate of toll appearing in the schedule; but on referring to the 95th section we find: "The said company shall from time to time cause to be painted on boards, and affixed and stuck up, and continued and renewed so often as the same shall be obliterated or defaced, upon a conspicuous place or conspicuous places in or near the said proposed pier or piers, jetty or jetties, and causeway or causeways, a list of the several rates and duties for the time being authorized to be taken as hereinbefore is mentioned." Looking at the introduction of the words, "for the time being," if the rates vary, and upon the board there is specified the maximum rate only, it is clear that that cannot be the kind of board intended to be set up, since the maximum sum mentioned in the schedule never varies. The board is put up for the persons interested in seeing and knowing what the charge for the time being really is which they are by law bound to pay, and which alone the company by law are entitled to demand, and it is that sum which is to be put on such board. If it expressed only what was in the schedule it would express the maximum, but it would not tell either the

officers of the company, who have to make the demand, nor those of whom the demand is made, what is the exact amount payable. It is competent to the company to vary the amount to be charged, and no other construction can be placed on the words, "the several rates and duties for the time being authorized to be taken," except that "for the time being" means at the time when the demand is made, and when the demand must be satisfied. The board was, therefore, not in compliance with the Act of Parliament, and the company were not entitled to demand anything. Under these circumstances the magistrates were quite right in dismissing the charge.

HAWKINS, J. I am of the same opinion. I have no doubt that the object and intention of the legislature was to make it imperative upon the company, as a condition precedent to their right to take any toll whatever, that they should fix a board upon the pier which should afford all those persons using it information as to the extent of the liability they were under. Of course, the question is, whether or not the legislature have in this Act of Parliament before us used language to carry out that intention, and I am of opinion that they have. The 85th section ought to be read in conjunction with the 130th, so that when the tolls have once been lowered in the manner provided by the 130th section, the company are not authorized to take, and the master of the vessel using the pier is not liable to pay, the maximum amount of toll, but is only liable to pay, and the company is only authorized to take the reduced amount of toll. The 95th section requires that a list of the several rates and duties "for the time being authorized to be taken as hereinbefore mentioned," shall be placed on the pier. Mr. Matthews says that the words, "as hereinbefore mentioned," must refer to the maximum amount of tolls, namely, in the case before us 2*s.* per 1000 in respect of bricks. I think that full weight may be given to these words, while at the same time we give effect to the words "for the time being," by construing the latter words in the way I have suggested, and the words "as hereinbefore mentioned," as referring to the authority conferred in s. 85. The 85th section authorizes to be taken—not at all times the maximum toll but—the maximum toll until it is

1879

GREGSON v. POTTER.

reduced, and when it is reduced by a resolution of the company then the reduced amount of toll until it is again raised. I am clearly of opinion in this case that the board was insufficient, and that the respondents were not liable to pay the toll, and that, therefore, the magistrates were quite right in refusing to convict.

Judgment for the respondents.

Solicitors for appellant: *Austen, De Gex, & Harding, for W. Gregson, Southend.*

Solicitors for respondents: *Digby & Jones, for Digby & Evans, Maldon.*

May 16.

DONOVAN *v.* BROWN.

Practice—Appeal by Motion from Inferior Court—Time for entering Appeal —Rules of Supreme Court, Order LVIII., rules 8 *and* 19.

Where a rule is obtained on a motion by way of appeal from an inferior Court, the appeal must be entered in the list at the Crown Office of the Queen's Bench Division under Order LVIII., rule 19, before the day mentioned in the notice to shew cause.

RULE calling on the defendant to shew cause, at the expiration of eight days from the date thereof, why the nonsuit herein, and the judgment (if any) entered thereon, should not be set aside and a new trial had.

The action was tried in the Mayor's Court of London on the 22nd of October, 1878, and this rule was applied for and obtained by the plaintiff on the 5th of November following, and a copy forthwith served on the solicitor for the defendant, but the case was not entered at the Crown Office in the list of appeals from inferior Courts, until the 3rd of February, 1879.

B. Firth, in shewing cause, took the preliminary objection that Order LVIII., rule 19 (1), had not been complied with in time. In

(1) Order LVIII., rule 19: "Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from inferior Courts, under s. 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from inferior Courts, which, until

1879

DONOVAN v. BROWN.

In re National Funds Assurance Company (1), it was held that an appeal under rule 8 (2) of the same Order to the Court of Appeal must be entered before the day mentioned in the notice of appeal for hearing, and he contended that that decision was applicable to this case.

Dunlop Hill, for the plaintiff. The motion was made in time, and proper notice was given, and the plaintiff ought not to be barred merely because of the delay in setting the case down, as rule 19 does not provide any limit of time in which this must be done.

THE COURT (Kelly, C.B., and Huddleston, B.), held that no distinction could be drawn in this respect between rule 8 and rule 19, and that *In re National Funds Assurance Company* (1) applied.

Rule discharged.

Solicitors for plaintiff: *James Chapman & Co.*
Solicitors for defendant: *Duffield & Bruty.*

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further order shall be assigned as heretofore to the present Judge of the Admiralty Court), shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division, and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those divisions shall from time to time direct."

(1) 4 Ch. D. 305.

(2) Order LVIII., rule 8. "The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof, shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal."

1879
March 22.

[IN THE COURT OF APPEAL.]

RUNTZ *v.* SHEFFIELD. (1)

Practice—Time for appealing—Appeal from Order made at Chambers during Long Vacation to Divisional Court—Rules of the Supreme Court, Order LIV., rule 6—Order empowering Plaintiff to sign Judgment upon specially indorsed Writ.

Order LIV., rule 6, which directs that an appeal from a decision at chambers shall be made within eight days, applies to decisions at chambers during the Long Vacation; and if that period has elapsed without the sitting of a Divisional Court, the right to appeal is lost, unless the party decided against obtains an extension of time.

An order empowering the plaintiff to sign judgment upon a specially indorsed writ, was made by a judge at chambers upon the 29th of August: the time for appealing to a Divisional Court was, on the 2nd of September, extended conditionally upon payment into Court of the sum sued for within fourteen days; this condition was never fulfilled, and no Divisional Court sat during the long vacation. Upon the first day of Michaelmas Sittings, the defendant moved the Exchequer Division to set aside the order made upon the 29th of August:—

Held, affirming the decision of the Exchequer Division, that as more than eight days had elapsed since the order was made, no appeal could lie.

APPEAL from an order of the Exchequer Division, affirming an order of Manisty, J., made at chambers.

The facts of the case are sufficiently stated in the judgment of Thesiger, L.J.

Feb. 25. *E. S. Saxton*, for the defendant. A strict construction of Order LIV., rule 6, will in the present case be productive of hardship. *Crom* v. *Samuels* (2) may be relied upon by the plaintiff's counsel, but it is distinguishable upon two grounds: first, during the Long Vacation of 1878, no Divisional Court at which the appeal could be taken sat; secondly, in the present case the defendant gave immediate notice of appeal and duly applied for an extension of time, thus doing all in his power to bring on his appeal at the earliest possible moment. Moreover, *Crom* v. *Samuels* (2), was, it is contended, really decided on the

(1) See now the Rules of the Supreme Court, March, 1879, Order LIV., rule 6.
(2) 2 C. P. D. 21.

ground of the laches of the defendant: otherwise it is inconsistent with the later decision of the Queen's Bench Division in *Forrest* v. *Davis*. (1) It would be unreasonable to deprive the defendant of the power to appeal; and although *Hallums* v. *Hills* (2), was decided upon a different rule, yet it establishes the principle that if the time limited for appealing expires before the party dissatisfied with the decision has an opportunity of applying to the Court, he is entitled to appeal at the next practicable sitting.

Douglas Kingsford, for the plaintiff. The words of Order LIV., rule 6, are peremptory, and do not admit of any exception; it is immaterial that no Divisional Court sat during the Long Vacation. *Deykin* v. *Coleman* (3) is very like the present case, and is conclusive in the plaintiff's favour. Moreover, by the order of the 2nd of September, the defendant received a benefit, for the plaintiff could not sign judgment and issue execution within the period of fourteen days; having received that benefit, he cannot now set aside the order of the 29th of August. The proper course for the defendant to adopt was to obtain an extension of time for appealing under Order LVII., rule 6.

March 22. The following judgments were delivered:—

THESIGER, L.J. This is an appeal from the affirmance by the Exchequer Division of an order of Manisty, J., made at chambers, under which the plaintiff was empowered pursuant to the provisions of Order XIV., rule 1, to sign judgment for the amount of a promissory note sued upon. The learned judge's order was made in the Long Vacation, that is to say, upon the 29th of August in last year. On the 30th of the same month, notice of appeal to the Divisional Court was given, and on the same day a summons to extend the time for appealing was taken out. That summons was heard on the 2nd of September, by Manisty, J., who made an order extending the time to the first sitting of the Divisional Court, conditionally upon payment into Court within fourteen days of 433*l.* 10*s.* 8*d.*, being the amount of the note and interest. The money was not paid into Court within the fourteen days or at any other time, and no sitting of the Divisional Court having

(1) Weekly Notes, 1878, at p. 88. (2) 24 W. R. 956.
(3) 36 L. T. 195; 25 W. R. 294.

1879

RUNTZ v. SHEFFIELD.

taken place in the interim, the defendant, at the first sitting of the Divisional Court in Michaelmas Sittings, appealed against the order of Manisty, J. The Divisional Court held that this appeal was out of time, and the order appealed against stood affirmed. Upon appeal to this Court the question of time is again raised and has to be decided. The rule, upon which the question turns, is rule 6, of Order LIV., which is in these terms: "In the Queen's Bench, Common Pleas, and Exchequer Divisions, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against." The Court below has construed the rule as meaning that the defendant was bound to bring on his appeal within eight days after the decision appealed from, unless the time was extended, and I am of opinion that this contention is correct.

In the first place, the language of the rule is unambiguous; it directs that the appeal shall be by motion, and shall be made within eight days after the decision appealed against. Now, if it is not read in its plain and literal meaning, how is it to be read? Are the words "if practicable," to be taken as understood? If so, are we to read it thus: "and, if not practicable within eight days, then upon the first practicable day afterwards;" or, are we to read it, "within eight practicable days;" i.e., eight days, on each of which the Divisional Court is sitting. If *Hallums* v. *Hills* (1) is to be treated, as it has been argued it should be, as an authority upon the construction of this rule, the latter alternative would seem to be the proper one, in which case a very indefinite, and at times unreasonably extended, period within which to appeal from orders at chambers, would be given. But whichever alternative be adopted, does it not entail the making instead of the interpreting of a rule? And is there any such manifest inconsistency with other rules, or any such necessary hardship consequent upon the interpretation of the particular rule according to its literal meaning as to induce us to depart from that meaning? I think not. The rules have provided against hardship, and at the same time have by their provisions for the exclusion altogether of certain days and the exclusion of other days on certain occa-

(1) 24 W. R. 956.

sions, in the computation of time, indicated, according to the maxim: "Expressum facit cessare tacitum," that they intended no implication to arise as regards other days or in reference to other occasions than those provided for. Suppose the eighth day in this case had expired on a Sunday, then the motion might have been made on the following day pursuant to Order LVII., rule 3, which provides as follows: "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall so far as regards the time for doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open." By the same rule, if the doing of an act on the last day on which it has to be done is only possible if the offices are open, then if the offices are not open on the particular day, the act may be done on the day on which the offices shall next be open. Where the rules wish to exclude for a particular purpose the Long Vacation from the computation of time, we find express provision, as in the case of filing, amending, or delivering any pleading by Order LVII., rule 5. There is a reason for not excluding the Long Vacation from the computation of time for the purpose of appeal from chambers to a Divisional Court, because the rules contemplate that such a Court will sit during vacation: see s. 28 of the Supreme Court of Judicature Act, 1873, and Order LXI., rules 5, 6; and, lastly, any hardship or injustice, which might otherwise be worked by the strict interpretation of such rules as that, which is in question in this case, can be remedied by rule 6 of Order LVII., which gives the widest power of enlarging the time appointed for the performance of any act either before or after the expiration of such time.

Apart then from authority, I am of opinion that the terms of the rule upon which the present question arises, are absolute and universal in their application, except so far as in other rules a qualification, limitation, or exception is to be found, and consequently that the order of the Court below was right. As regards authority, there is in favour of the view which I have expressed, a distinct decision turning upon the construction of the particular

1879

RUFFE v. SHEFFIELD.

rule in *Crom* v. *Samuels* (1), while *Hallums* v. *Hills* (2), which is cited in support of the appellant's contention, is a case upon another rule couched in different language, and a case, the decision on which may well stand with that in *Crom* v. *Samuels* (1) and the present case.

I am of opinion therefore, that the appeal should be dismissed.

BRETT, L.J. I assent to the judgment delivered by Lord Justice Thesiger, with great reluctance; for our decision in favour of the plaintiff seems to amount almost to a denial of justice. I should have been glad to hold that Order LIV., rule 6, does not apply to this case; but on a review of the orders and rules, I feel myself compelled to come to the conclusion that its operation is not confined to the time when the sittings are going on. The appeal must be dismissed.

COTTON, L.J. I also agree with reluctance that the appea must be dismissed; for the rules appear to work a hardship; but relief cannot be given by judicial decision; the remedy must be effected by an alteration of the rules.

Appeal dismissed.

Solicitor for plaintiff: *J. P. Poncione.*
Solicitors for defendant: *Champion, Robinson, & Poole.*

(1) 2 C. P. D. 21. (2) 24 W. R. 956.

[IN THE COURT OF APPEAL.]

1879
March 22.

POSTLETHWAITE *v.* FREELAND AND ANOTHER.

Ship—Charterparty—"Cargo to be discharged with all Despatch according to the Custom of the Port"—Delay by Charterer in unloading Vessel through Deficiency of Lighters.

The defendants chartered the plaintiff's vessel, the *C.*, to carry a cargo of rails to the port of L. The charterparty provided that the cargo should be taken from alongside at merchants' risk and expense, and should be "discharged with all despatch according to the custom of the port." By the custom of the port of L. vessels were discharged by lighters worked along a warp, and upon the arrival of a vessel she was reported at the port-office, and in her turn, with respect to vessels which had previously arrived, one lighter was sent to her every working day until she was discharged. Upon the arrival of the *C.* at L. only four of the lighters were suitable for the discharge of her cargo, and seven vessels laden with similar cargoes were already lying there; in consequence of these circumstances the defendants were unable to begin the discharge of the cargo of the *C.* until twenty-four working days had elapsed from her arrival. The plaintiff having sued to recover damages for the detention of the *C.* at L. during these twenty-four days, at the trial the judge directed the jury that, under the circumstances above-mentioned, there was no obligation upon the defendants to provide one lighter for unloading the cargo of the *C.* for every working day after she was ready to unload, and that if the defendants had used the existing appliances at L. with due despatch, according to the custom of the port, the jury ought to find for them:—

Held, by Brett and Thesiger, L.JJ., affirming the decision of the Exchequer Division, Cotton, L.J., dissenting, that the direction was correct.

THIS was an appeal by the plaintiff from an order of Kelly, C.B., and Hawkins, J., discharging an order for a new trial.

The fact of the case and the arguments in this Court are sufficiently stated in the judgments hereinafter set out.

March 1, 3. *Cohen, Q.C.*, and *Bigham*, for the plaintiff; *Watkin Williams, Q.C.*, and *J. A. McLeod*, for the defendants.

In addition to the cases mentioned in the judgments, the following case was referred to in the course of the argument: *Randall* v. *Lynch.* (1)

Cur. adv. vult.

March 22. The following judgments were delivered:—

THESIGER, L.J. The plaintiff in this action was on the 28th of

(1) 2 Camp. 352.

1879

POSTLE-THWAITE v. FREELAND.

April, 1875, the owner of a vessel called the *Cumberland Lassie*, and on that day chartered her to the defendants to carry a cargo of about 370 tons of steel rails and fastenings from Barrow-in-Furness to East London, in South Africa, and there discharge. The charterparty provided that the cargo should be brought to and taken from alongside at merchants' risk and expense, and contained the following stipulation: "The cargo is to be discharged with all despatch, according to the custom of the port." The action is brought to recover damages for the alleged breach of such stipulation. The port of East London is situate upon a river having a bar at its mouth, and into which, in consequence, vessels of the burden of the *Cumberland Lassie* are unable to enter until the greater part of their cargo is discharged. The discharge is performed by means of lighters, which are worked to and from the ship in a somewhat unusual manner. There is one large warp or cable from the inside to the outside of the bar; from that warp there branch out minor warps; and to those minor warps vessels loading or unloading their cargoes attach their own cables. The lighters have neither sails nor oars, and are worked by being pulled along the warps and cables, which I have described. In 1875 the business of loading and unloading vessels was mainly conducted by a company called the East London Landing and Shipping Company, to which the warps belonged, and which owned nine or ten lighters for working in conjunction with the warps. Four only of these lighters were suitable to the discharge of the cargo of the *Cumberland Lassie*. The custom or practice of the port, as regards the discharge of vessels, was as follows:—Vessels upon arrival reported themselves at the port-office, and in the order in which they reported themselves, their turn, as it was called, for unloading came in rotation. As soon as a vessel came in turn, one lighter was sent to her, every working day, until such time as she was finally discharged; with the exception that when the mail steamers came in, a preference was given to them. The *Cumberland Lassie* arrived at East London on the 31st of August, 1875, and was ready to commence discharging her cargo on the following day. It happened, however, that at the end of 1874 or the beginning of 1875 the supply of iron rails to the government at East London had commenced, and in consequence the number

1879

POSTLE-THWAITE v. FREELAND.

of vessels arriving at the port in the autumn of 1875 was increased, and when the *Cumberland Lassie* arrived, there were already lying in the roadstead seven vessels laden with similar cargoes to her own. The government obtained from Algoa Bay, situate at least 150 miles south of East London, three or four surf boats, two of which appear to have been brought to East London after the *Cumberland Lassie* arrived there, and all of which, with the exception of one under repair, were employed in discharging the vessels which arrived before the *Cumberland Lassie*. In the result the turn for the discharge of that vessel did not come until the 6th of October, when a lighter of the East London Landing and Shipping Company commenced to discharge the cargo. From that time it is not contended on the part of the plaintiff that there was any undue delay, but inasmuch as twenty-four working days intervened between the date of the ship's being ready to discharge and the 6th of October, the plaintiff seeks to recover damages in respect of the non-discharge of cargo during these twenty-four days. The evidence establishes that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of like tonnage during the autumn of 1875. At the trial Lord Coleridge left to the jury to say, first, whether there was any settled practice or custom between the months of April and November, 1875, as to the unloading of sailing vessels, laden as the *Cumberland Lassie* was laden, in the port of East London; secondly, if there was, whether the *Cumberland Lassie* was unloaded with all despatch according to the custom; and the jury having answered both questions in the affirmative, the learned judge directed the verdict and judgment to be entered for the defendants. The plaintiff moved the Exchequer Division for a new trial, on the ground of misdirection and that the verdict was against evidence; and the conditional order for a new trial having been discharged, appealed to this Court.

The argument before us has really resolved itself into a question as to the construction, which the clause in the charterparty, "the cargo is to be discharged with all despatch, according to the custom of the port," when read in conjunction with the facts, ought to bear. The plaintiff contends in substance that Lord

1879

POSTLE-THWAITE v. FREELAND.

Coleridge should have told the jury that as soon as the *Cumberland Lassie* was ready to discharge, the defendants ought to have provided her with one lighter for every working day, except, perhaps, days on which the lighters were engaged in discharging the mail-steamers. If the plaintiff is right in this contention, I think it clear that the learned judge did misdirect the jury, for he certainly indicated to them that there was no such obligation upon the defendants to provide lighters; but I am of opinion that the plaintiff is not right in his contention. In order to support it, his counsel treat the clause of the charterparty in question as if the words "with all despatch" were unconnected with the words "according to the custom of the port," and endeavour by that means to read the clause as running in this way—"the cargo is to be discharged according to the custom of the port and with all despatch." Reading the clause in that way, they argue, not without force, that the custom of the port was to regulate the mode of discharge, i.e., the mode of discharging by a single lighter worked by the warps and cables, but was not to regulate the time of commencing the discharge or the rate of despatch, which, it was contended, was to be as fast as one lighter, commencing as soon as the vessel was ready to discharge, could on working days discharge the cargo. In my opinion, however, the words "according to the custom of the port," placed as they are in immediate juxtaposition with the words "with all despatch," were intended to be read, and must be read, so as to qualify these latter words; and if that be so, it appears to me to follow that the practice or custom as to vessels coming on turn was one, which regulated the despatch of the *Cumberland Lassie* just as much as the practice or custom of unloading vessels by lighters worked along the warp or cables. Indeed lighters, warps, and cables may in this case be looked upon as forming one apparatus for unloading, and the plaintiff had no right to complain of the defendants, because this apparatus was, until the 6th of October, occupied by vessels which arrived before the *Cumberland Lassie*, and over which the defendants had no control.

The decision in this Court of *Wright* v. *New Zealand Shipping Company* (1), to which we have been referred, is in no way

(1) See note at end of case.

inconsistent with this view. There the charterparty did not contain any express provision in reference to the discharge of the cargo, and the obligation of the charterer was therefore that implied by law, namely, to discharge within a reasonable time. The ordinary time for discharge of vessels of similar burden with and loaded as the chartered vessel in that case was loaded was proved to be thirty-five days; but owing to a concourse of vessels annually taking place at a particular time of the year at which the plaintiff's vessel happened to arrive, and due in great measure to arrivals of the defendants' own vessels, the lighters were inadequate in point of number, and the plaintiff's vessel was delayed for a much longer period than thirty-five days. Upon that state of facts it was held that the shipowner ought not to be the sufferer from a delay against which the defendants might themselves have provided, in respect of which the charterparty contained no express stipulation, and the cause of which, although recurring at fixed intervals of time, was exceptional when compared with the general state of the port of discharge.

The cases of *Tapscott* v. *Balfour* (1) and *Ashcroft* v. *Crow Orchard Colliery Company, Limited* (2), are also distinguishable from the present. In the former the loading of a cargo of coals was to be in the usual and customary manner, nothing being said as to the time, and it was held that the words applied to the mode of loading only, and that the charterer was responsible for delay which arose from his vessel's inability to get under the tips, that inability again being due to the number of vessels in turn to go under the tips before her, and several of which were loaded by the agent employed by the charterer. It is to be observed, too, that in that case it was proved that, although loading from the tips was the most usual method of loading in the particular dock, it could be, and not unfrequently was, done from lighters; and Denman, J., in his judgment, relies upon the fact as additional support to the view that the charterer, who might have obtained lighters, was responsible for the delay. In *Ashcroft* v. *Crow Orchard Colliery Company* (2), a cargo of coal was to be loaded with the usual despatch of the port, or, if longer detained, the ship was to be paid 40*s.* demurrage; and it was held that the charterers were liable

(1) Law Rep. 8 C. P. 46. (2) Law Rep. 9 Q. B. 540.

1879

POSTLE-THWAITE v. FREELAND.

for a detention outside the docks for an unusual time, that detention being due to the fact that the charterers themselves had, when the charterparty was entered into, three ships loading in the docks and ten other charters in their books having priority over the plaintiff's.

None of the decisions to which I have referred in any way impugned the authority of cases of the class of *Leidemann* v. *Schultz* (1) and *Lawson* v. *Burness* (2), which were decided in favour of the charterer upon words in the charterparty importing that he was only to be bound to take cargo in regular turn of loading. They are merely illustrations of the principle enunciated in *Ford* v. *Cotesworth* (3), and to which my judgment in this case is in no way opposed. That principle is that under a charterparty which provides for the delivery of the cargo in the usual and customary manner, but is silent as to the time to be occupied in the discharge, the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him. Here the use of the warp and lighters in regular turn was part of the custom of the port, by which the discharge "with all despatch" was to be qualified and limited, and by that custom the control of the lighters as well as of the warp was no more in the hands of the charterers than it was in the hands of the shipowners.

For these reasons I am of opinion that the ruling of the learned judge at the trial was correct, that the findings were warranted by the evidence, and that this appeal should fail.

COTTON, L.J. This was an action by the owner of a sailing vessel called the *Cumberland Lassie* against the charterers for detention of his ship. The action was tried before Lord Coleridge, C.J., and resulted in a verdict and judgment for the defendants, and this was an application by way of appeal from the Exchequer Division for a new trial on the ground of misdirection.

By the charterparty, which was dated the 28th of April, 1875, it was agreed that the *Cumberland Lassie* should take a cargo of rails from Barrow-in-Furness to East London in South Africa, and

(1) 14 C. B. 38; 23 L. J. (C.P.) 17.
(2) 1 H. & C. 396.
(3) Law Rep. 4 Q. B. 127; Ex. Ch. 5 Q. B. 544.

1879

POSTLE-THWAITE v. FREELAND.

it was stipulated that the cargo should be brought to and taken from alongside at merchants' risk and expense; and, further (which is the provision on which the question turns), that the cargo was to be discharged with all despatch according to the custom of the port. It was for delay in accepting delivery of the cargo at the port of discharge that the action was brought. The ship arrived at East London on the 31st day of August, 1875. The harbour there is a bar harbour, and vessels of the size of the *Cumberland Lassie* are obliged to unload a considerable portion of their cargo before they can cross the bar. The discharge of cargoes outside the bar is effected by means of lighters or other small vessels. The usual way by which, in September, 1875, lighters were brought alongside the vessel to be unloaded, was by means of a warp consisting of a rope carried across the bar and fastened to buoys, and on the outside connected with other ropes branching from it; from the ends of these branch warps the lighters were warped to the vessel to be unloaded by a rope provided by that vessel. The complaint of the plaintiff is that for twenty-four working days after the *Cumberland Lassie* arrived at the port no lighter or other vessel was provided by the defendants, the charterers, to accept delivery of the cargo. The defendants admit the fact, but they say that having regard to the terms of the charterparty and the facts proved they are not liable for the delay. It was proved at the trial that at the time when the *Cumberland Lassie* arrived at East London and was in course of unloading, the only lighters for unloading vessels outside the bar, with the exception of three boats belonging to the government, belonged to a company which had purchased these lighters and the warp from the government, that there was a practice or custom at the port that every sailing vessel should be taken in turn for unloading according to the time of her arrival in port, and that when the turn of a vessel arrived she should have the services of one lighter only and once only in the day; that the company had four lighters only capable of carrying iron rails; that mail-steamers were as against sailing vessels entitled to preference in the use of the lighters, and that in regular turn the *Cumberland Lassie* was not entitled to the use of a lighter for discharge of her cargo before the

1879

POSTLE-THWAITE v. FREELAND.

twenty-four working days had expired. There was evidence that, having regard to the number of vessels in the port at the time when the *Cumberland Lassie* arrived, and to the number of lighters then at the port available for unloading rails, the turn of the plaintiff's vessel to have a lighter for unloading the cargo did not arrive before the twenty-four days had expired. The defendants contend that the reference to the custom of the port contained in the provisions of the contract, to which I have referred, absolves the defendants from liability. So Lord Coleridge directed the jury. For he in his summing-up in effect directed that if they found that at the date of the charterparty and from that time till the time of unloading there was a practice at the port as to the unloading; and, if so, that the defendants used the existing appliances with due despatch in accordance with the practice, they should find for the defendants. If the delay of which the plaintiff complains was not attributable to what can be called the custom or practice of the port, this was a misdirection. For in the absence of any reference to the custom of the port, and if there was no express stipulation in the contract to regulate in this respect the rights and liabilities of the plaintiff and defendants, it would be the duty of the charterers to provide at or shortly after the vessel was ready to discharge her cargo appliances of the kind ordinarily in use in the port for the purpose of taking delivery, that is, in the present case lighters or other small vessels capable of passing the bar. Did then the reference to the custom of the port vary the defendant's liability in this respect? It was argued that it does so, because the custom or practice of the port was that vessels should be entitled to lighters in turn according to the times of their respective arrivals, and by treating the warp and lighters as one entire instrument for unloading vessels outside the bar. But there was no evidence that a larger number of lighters than were in use at the time in question in the port could not have crossed the bar daily by means of the warp, and on the contrary there was evidence that shortly afterwards a larger number of lighters were employed in unloading vessels and crossed the bar by means of the warp. The delay, therefore, was attributable to the number of lighters at the port being insufficient for the number of vessels.

The number of lighters cannot in my opinion be considered as a matter regulated by or dependent on the custom or practice of the port. It would not, I should think, be contended that, however the business of the port might increase, it could be said to be the custom or practice of the port, that the only lighters for hire there should be such as the company were for the time being possessed of. In my opinion the defendants are not, by the qualifying reference in the charterparty to the custom of the port, protected from liability for delay caused by the number of lighters at the port being insufficient for the vessels for the time being in the port. It is said that this will make the words "according to the custom of the port" inoperative and strike them out of the contract. But in my opinion this is not the case. These words will qualify the words "with all despatch" by excusing any delay caused, for example, by the preference given by the practice of the port to mail-steamers, or by no work being done on those days, which it is the practice of the port to observe as holidays.

It was much pressed in the course of the argument that it was impossible for the charterers to provide more lighters. But if the construction which I have put upon the contract is correct, the defendants cannot protect themselves from liability to pay damages to the plaintiff for the delay by alleging that this is attributable to their inability to discharge an obligation, which the defendants as between themselves and the plaintiff had undertaken.

It was said that the number of the lighters was insufficient, in consequence of there being at the time an unusually large number of vessels which were waiting to discharge their cargoes. In my opinion, if such was the case, it cannot excuse the defendants from liability. For if such was the case, the delay would be caused by an accident, of which, as between themselves and the plaintiff, the defendants must bear the loss.

BRETT, L.J. The only question before the Court is whether there should be a new trial, on the ground of misdirection. In effect the jury found that the ship had been discharged according to the provisions of the charterparty. Lord Coleridge asked the jury whether there was a settled practice at the port of East

1879

POSTLE-THWAITE v. FREELAND.

London, and whether the ship had been discharged according to that practice. They found both these questions in the affirmative. So far it is impossible to say that there was the slightest misdirection; for the questions which I have mentioned were such as it was necessary to ask the jury. But it was contended that there was misdirection with regard to what might properly be called a part of the practice of the port, and it will be found, I think, that the real objection is, that Lord Coleridge allowed certain matters to be given in evidence, which could not, it was alleged, be deemed in law to be part of the practice of the port. Evidence was given that the only lighters available to either shipowner or charterer belonged to either a particular company or the government, and that they were supplied to the ships only in turn. It was shewn that this mode of unloading vessels had existed for so long a time as to amount to a custom. It is suggested that this evidence, which was accepted by the jury, was immaterial, for it is excluded by the clause in the charterparty, which provides that the cargo shall be "discharged with all despatch, according to the custom of the port." To me this clause seems to mean that the ship was to be discharged with all such despatch as was consistent with the manner and the process, wherewith every vessel going to that port is discharged. What are the manner and the process by which a vessel is discharged at East London? If she cannot cross the bar, she must lie outside and discharge her cargo, at least in part, into lighters. These lighters have to be brought out along a fixed warp, and after they have got across the bar they have to be taken to the ship lying in the roadstead by means of branch warps, and also of ropes coming out from her. By a similar process they return inside the bar, and when empty are warped out again to the ship. East London is 150 miles at least from any other port from which additional lighters can be procured, and as a matter of business it was impossible to procure them upon any emergency arising at East London. Therefore the mode of discharging vessels arriving at this port would be by lighters belonging to this port, and according to the evidence no lighters from any other port were ever sent for or used, and the lighters at East London could not be procured at pleasure, but were supplied in a particular way by a company or by the government, that is, only one lighter was

1879

POSTLE-THWAITE v. FRIELAND.

every day supplied to each vessel, and the supply commenced in the vessel's "turn" after her arrival at the port. It follows that the manner in which, or the process by which, every ship which arrived at that port had to be unloaded, was by placing herself upon "turn," by waiting until her "turn" came, and then by discharging her cargo into the one lighter sent to her every day, regard being had to the mail steamers. I am so far from thinking that these circumstances cannot form part of the custom at East London, that they seem to me to form the only real and substantial part of the custom. The essential part of the custom in favour of the charterers was, that they were not bound to discharge the plaintiff's ship until her "turn" came to have a lighter from the company or the government. It is admitted that unless the defendants were bound to fetch lighters from another port, every possible diligence was used in discharging the *Cumberland Lassie*. The defendants did all that they were bound to do, and they were excused by the custom from doing that which the plaintiff complains of as an omission. In my opinion the evidence objected to was properly admitted, the finding of the jury was right, and, so far as I can see, no other conclusion could have been arrived at.

In my opinion the decision of the Exchequer Division ought to be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Chester, Urquhart, Mayhew, & Holden, for R. B. D. Bradshaw, Barrow.*

Solicitors for defendants: *Allin & Greenop.*

[IN THE COURT OF APPEAL.]

June 28.

WRIGHT *v.* NEW ZEALAND SHIPPING COMPANY, LIMITED.

Ship—Charterparty—"Cargo to be brought to and taken from alongside free of Expense and Risk to the Ship"—Delay by Charterer in unloading Vessel through Deficiency of Lighters.

The defendants chartered the plaintiff's vessel, the *C.*, for a voyage to the port of L. The charterparty provided that the cargo was "to be brought to and taken alongside free of expense and risk to the ship;" but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and

1879

POSTLE-THWAITE v. FREELAND.

when the *C.* arrived, the port was crowded with vessels, about half of which belonged to the defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the *C.* before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging the other vessels lying at the port:—

Held, that in determining whether the terms of the charterparty had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account.

ACTION against charterers by the owner of the ship *China* for not unloading her with due and reasonable despatch and within a reasonable time, and for demurrage.

The cause came on for trial at the Northumberland Spring Assizes, 1878, before Pollock, B., and a special jury, and the following were the material facts of the case.

By a charterparty dated the 30th of September, 1873, the plaintiff undertook that his ship the *China* should take on board in London "all such cargo . . . . as may be required by the charterers, and on being despatched shall with all due speed proceed to Lyttleton, New Zealand, and there shall deliver the said cargo, &c., as per bills of lading, into lighters alongside or at the wharf as charterers' agents may direct, ship always being afloat. . . . The charterers may ship one thousand tons rails, and may load the vessel to an average draught of 20 feet. . . . The cargo to be brought to and taken from alongside free of expense and risk to the ship . . . . the ship is to be consigned inwards only to the" defendants "or their agents in the colony." Except as above mentioned the charterparty contained no clause as to discharging the *China* at Port Lyttleton. She was ordered by the defendants to the West India Docks in London, and there loaded a general cargo consisting partly of iron, and on the 14th of November, having completed the loading, was hauled out of dock into the Thames and proceeded on her voyage to Port Lyttleton, where she arrived on the 16th of March, 1874, and upon the 18th was placed in a discharging berth, one mile and a quarter from the town, to which she could not go nearer owing to her draught of water. At Port Lyttleton were only two firms of lightermen for discharging cargoes, one of which, Messrs. Cameron Brothers, worked solely for the defendants, and the *China* being consigned to the order of the defendants or their agents, her captain was compelled to employ Messrs. Cameron alone to discharge her. Some bulls and sheep, which she had carried on deck, were sent ashore about a week after her arrival; but otherwise the discharging of her cargo did not commence until the 30th of March, and was not completed until the 29th of May, a period of seventy-two days from the time of arriving at her berth. The number of days actually employed in unloading the *China* was only thirty-four, and the discharge was effected by the aid of lighters; after deducting the Sundays, Good Friday, and Easter Monday, when no work was done, and three or four days when the weather was stormy, the delay in unloading was occasioned solely by the failure of Messrs. Cameron to send lighters alongside the *China*. Port Lyttleton at the season when the *China* arrived was usually crowded by a "rush" of vessels; in March and April, 1874, about twenty vessels were lying there, of which one-half either belonged to or were chartered by the defendants. The number of lighters was small; and it was proved that after the

arrival of the *China* preference as to discharging cargoes was shewn by the defendants' agents to vessels with "round" charters, that is, to vessels chartered for the voyage from a British port and back again. After part of the cargo had been discharged, the berth of the *China* was shifted to within three-quarters of a mile from the shore. If ordinary despatch had been used, the cargo of the *China* would have been unloaded in thirty-five days after she was moored at her discharging berth on the 18th of March, 1874.

Pollock, B., in summing up told the jury that they were to take into consideration the circumstance that the port was full of vessels, but he did not tell them that they were not to consider the deficiency of lighters caused by the large number of ships so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound at all events to allot the lighters proportionately amongst the vessels or to use the lighters for them in the order in which they arrived.

The jury found in favour of the defendants, and judgment was entered for them.

An order nisi for a new trial was obtained in the Queen's Bench Division on the ground of misdirection, and of the verdict being against the weight of evidence, and was after argument made absolute by Cockburn, C.J., and Mellor, J.

The defendants appealed.

1878. June 27. *Cave, Q.C.*, and *H. Shield*, for the defendants. The defendants are not liable in the present action, for they did all that could be reasonably required for the discharge of the *China*, regard being had to the other vessels then lying at Port Lyttleton; the defendants, as far as was practicable, availed themselves of the ordinary facilities of the port, and if the number of lighters happened to be too small for the occasion, that was a contingency against which the defendants were not bound to provide.

Herschell, Q.C., and *J. P. Aspinall*, for the plaintiff. Under a charterparty like that entered into between the parties to this action the owner of the ship is entitled to have her unloaded within a reasonable time; this is the rule to be deduced from *Ford* v. *Cotesworth* (1), and *Adams* v. *Royal Mail Steam Packet Co.* (2). The defendants thought fit to allow only one of the firms of lightermen to be employed: they ought to have allowed the other to be employed or to have obtained lighters elsewhere. They in part at least caused the delay by sending so many other vessels to Port Lyttleton at the time when the *China* was expected.

Shield, in reply. The defendants were entitled to take into account their engagements with other ships; the plaintiff was bound to submit to any loss or inconvenience arising from the crowded state of the port.

Cur. adv. vult.

June 28. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this appeal should be dismissed. I

(1) Law Rep. 4 Q. B. 127; Ex. Ch. 5 Q. B. 544.

(2) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.

1879

POSTLE-THWAITE v. FREELAND.

think that the order of the Queen's Bench Division was right: for, as it seems to me, the finding of the jury was against the weight of evidence and cannot be supported.

The charterparty contained no statement as to the number of days, which should be allowed to the charterers for discharging the cargo; they were therefore bound to unload the vessel within a reasonable time. In my judgment a reasonable time for doing an act is a time within which it can be done by a person working reasonably; but the time which he spends in making his preparations for doing the act is not to be taken into account. Applying this rule to the present case, I think that the defendants, upon the arrival of the ship, were bound to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission to do so on the ground that at the port of discharge there was only a certain number of lighters, and when the plaintiff's vessel arrived other ships belonging to other persons required those lighters, and the defendants got lighters for unloading the cargo as soon as they could. To my mind these circumstances afford no answer to the plaintiff's complaint: the defendants having undertaken to unload the vessel were bound to be ready to do it, and to finish it within a reasonable time.

If I have stated the law correctly, it is manifest that the finding of the jury is against the weight of evidence, for the contention of the defendants is not that they discharged the cargo within a reasonable time, according to the interpretation of the expression already mentioned, but that they discharged it within a reasonable time, if they are at liberty to take into account the embarrassment under which they were on account of there being only a certain number of lighters and a large collection of ships. In considering facts like these it is necessary to take into account what may be called the physical condition of the port: if a vessel cannot get within two miles of the shore, the charterers must have a longer time for unloading her than if she could come within a few yards; and, as it seems to me, if it is convenient for her to get nearer the shore after she has been lightened, the time consumed in bringing her nearer the shore is not to be reckoned as part of the time, within which the charterer is bound to unload her. Circumstances of this sort may be taken into account, but not such as are relied upon by the defendants in this case. A difficulty may arise where a ship is bound to go to a certain place which is inaccessible, but in the present case, if it was an obligation upon the defendants to be ready to discharge the vessel upon her arrival, they are responsible although the delay arose from the port being occupied by other vessels. It may be different where both parties have agreed that the ship shall be discharged in a dock, and the ship on her arrival cannot get into the dock on account of some defect at the entrance which is not the fault of the shipowner or the charterer; in such a case as that neither of them is liable, for neither of them has made default in doing, within a reasonable time, what he is bound to do, and it would be as unreasonable to say that the charterer had not discharged the ship within a reasonable time, as it would be to say that the owner of the ship had not brought her into dock within a reasonable time; neither statement would be well founded. To explain my meaning, I may put an illustration: if I order a coat of a tailor, he must make it within a reasonable time, that is, a reasonable time for a man who has the workmen and materials for making the coat; in estimating that reasonable time he ought not to be

allowed any time for buying the cloth and other materials and for hiring the workmen.

This is the view of the law which I take. Cotton, L.J., has communicated to me the substance of the judgment which he is about to deliver, and I entirely agree with it.

COTTON, L.J. I agree in thinking that there must be a new trial, that is to say, that even according to the ruling of the learned judge at the trial the judges of the Queen's Bench Division were right in holding that the cause must be tried again. This consideration really disposes of the appeal; but I think it right to say what, in my opinion, after the argument before us, is the law applicable to the facts in order that the case may not come to this Court after a second trial.

The contract between the parties imposed upon the charterers the obligation to unload within a reasonable time, for as no time is mentioned, the unloading must be done within a reasonable time. In a contract of this nature a difficulty arises as to the meaning of the expression "reasonable time," and I think that the difficulty arises from not considering what the obligations of the parties are, and from not considering what facts are to be taken into account as between the parties to the contract in ascertaining what is a reasonable time. Therefore I propose to state what is the obligation of the charterers under these circumstances, and what they are entitled and what they are not entitled to take into account in fixing what is a reasonable time. I shall not attempt to lay down an exhaustive rule, but shall speak chiefly with reference to the case before us. In determining whether a duty such as is created by this charterparty has been performed within a reasonable time, we must take it that an obligation is imposed on the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port, and that he must have them ready either when the ship arrives, or within a short time, such as a day or a couple of days, after her arrival; perhaps where a ship arrives unexpectedly, much sooner than could have been anticipated, a delay may be allowed, and a different rule may be applicable from that governing a case where the ship arrives at the appointed time. I say "appliances of the kind ordinarily used at the port" for which the ship is destined, because the charterer ought not to be called upon to provide appliances which are not in use there but which are in use at other ports; he is not bound to provide at a port in New Zealand appliances, which are not in use there but are in use in the port of London; for they cannot be deemed to have been in the contemplation of the parties. Although the charterer may not be bound to work during the whole of the twenty-four hours, yet he must work during the ordinary time of working at the port where the ship is to unload. I will proceed to consider what circumstances will entitle the charterer to allowances for delay. I apprehend that he will be entitled to an allowance if any difficulty arises from the natural or physical peculiarities of the port, such as that the ship is obliged to lie at some considerable distance from the land, or that while the wind is blowing from certain points of the compass ships cannot be unloaded into lighters: he may be entitled to an allowance also if after a ship has been partly unloaded in deep water, she is brought into shallower water for the more convenient discharge of her cargo: whether the unloading can go on during the change of berth is a question of fact upon which the jury must give their opinion. I think also that allowance must be made for any holidays usually

1879

POSTLE-THWAITE v. FREELAND.

observed at the port, and during which no work is done. There may be other circumstances entitling the charterer to allowances; and the defendants in the present case appear to be entitled to allowances for the circumstances above-mentioned. But are they entitled to allowances for the circumstance upon which their counsel chiefly relied? It was contended, as I understood, that because the defendants had other ships at Port Lyttleton, and other ships were lying there consigned or belonging to other owners, and because the number of the lighters at the port was limited, they are not liable to the plaintiff for the delay which has occurred. I think that upon this point the finding is unsatisfactory with regard to the evidence. But is the contention for the defendants sound in point of law? In my opinion it is not. For the purpose of ascertaining what is a reasonable time the defendants are not entitled to excuse delay, which would be otherwise inexcusable, by alleging that they had sent so many vessels to the port that the number of lighters which they had engaged did not enable them to unload the plaintiff's ship within what would otherwise have been a reasonable time. It was the duty of the defendants to provide sufficient appliances for unloading the plaintiff's ship. In like manner the defendants cannot excuse the delay by alleging that there were at the port so many other vessels consigned or belonging to other persons as to prevent them from using the appliances, which otherwise might have been used for the purpose of unloading the ship. Upon the principles which I have stated the question must be decided what is a reasonable time for unloading the plaintiff's vessel according to the charterparty.

THESIGER, L.J. I am of the same opinion. The contract between the parties to this action was that which the law implies, namely, that the ship should be unloaded at her port of discharge within a reasonable time. A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties the charterers would not be relieved from the consequences of fortuitous or unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be a result of the cases of *Adams* v. *Royal Mail Steam Packet Company* (1) and *Ford* v. *Cotesworth*. (2) In the present case it is proved that at Port Lyttleton about thirty-five working days would in general be occupied in discharging a vessel of the burden of the *China*, loaded as she was loaded under the charterparty in question; but it is said on the part of the defendants that at the particular time of the year at which she arrived at the port the concourse of vessels was, as a yearly occurrence, such that lighters could not be obtained regularly enough to discharge the vessel within the time mentioned. Now, although that circumstance might be one which did, as a matter of fact, recur at the same time in each year, it was not in my opinion, an ordinary circumstance of the port, the consequence of which the shipowner was to be called upon to bear. He has a right to assume, when he contracts to discharge the cargo into lighters, that the charterers will provide a proper supply of lighters to unload the cargo within such time as would be reasonable, having regard to the character of the vessel and the quantity and description of the cargo, and the event of there not being sufficient lighters for the purpose is one of those fortuitous or unforeseen

(1) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.

(2) Law Rep. 4 Q. B. 127; Ex. Ch. 5 Q. B. 544.

(unforeseen at least as regards the shipowner) impediments affecting only the due performance by the charterers of their part of the contract, and from the consequences of which they are not relieved. And, as a matter of common fairness, they ought not to be relieved from them, unless some express stipulation upon the point is made in the contract of charter, and for this reason, namely, that the shipowner cannot in any way control the arrangement as to lighters, and cannot be supposed to know the times at which owing to the circumstances of the particular port there may be a difficulty in obtaining them. He therefore makes his arrangements for the employment of his vessel with reference to the time within which, under ordinary circumstances (and amongst them the circumstance of a due supply of lighters), his vessel will be discharged. On the other hand, the charterers have a control as well as knowledge in the matter, and can, if they choose, make special arrangements to meet special emergencies; and if they do not choose to make those special arrangements in order that the chartered vessel may be unloaded within a time which would be reasonable under what the shipowner would naturally and properly assume to be the ordinary circumstances of the port, it is but reasonable that they should indemnify the shipowner for the loss thereby sustained. If this be the law, it is clear, and indeed it is admitted by counsel for the defendants, that the jury had not the law presented to them as it should have been; and for that reason therefore there should be a new trial; but even assuming that the difficulty in obtaining 'lighters caused by the rush of vessels to the port of discharge at the particular time in question were to be taken into account in favour of the defendants, I am further of opinion that upon the facts of this particular case the verdict was against the evidence and should be set aside.

Appeal dismissed.

Solicitor for plaintiff: *H. C. Coote, for H. A. Adamson, North Shields.*
Solicitors for defendants: *Hollams, Son, & Coward.*

The above case of *Wright* v. *New Zealand Shipping Company* was not tried a second time, but after the judgment of the Court of Appeal the defendants paid into court a sum of about 230*l.*, which the plaintiff accepted in satisfaction of his causes of action.

1879
May 26.

THE ATTORNEY GENERAL AND THE HUMBER CONSERVANCY COMMISSIONERS AND OTHERS *v.* CONSTABLE AND ANOTHER.

Crown, Prerogative of the—Right of Sovereign to Injunction to restrain Action —Jurisdiction of Exchequer Division in Matters affecting Revenue—Judicature Act, 1873, *s.* 24, *sub-s.* 5, *s.* 34—*Rules of Supreme Court, Order LXII.*

The prerogative of the Crown to intervene in actions affecting the rights or revenue of the Sovereign has not been affected by the Judicature Acts; and for the determination of such matters the Exchequer Division of the High Court of Justice has all the powers formerly possessed by the Court of Exchequer.

THIS was an application by the Attorney General, on behalf of her Majesty, to restrain an action brought in the Chancery Division, and to remove it into this Division, on the ground that the matters in question in the action concerned her Majesty's revenue and privileges.

It appeared that in March, 1878, Sir Frederick Augustus Talbot Constable and Thomas Constable commenced an action in the Chancery Division, before Malins, V.C., against the Humber Conservancy Commissioners, and the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, claiming a declaration that the plaintiffs in that action were seised of the foreshore of the river Humber and the estuary thereof within the seigniory, liberty, manor, and fee of Holderness, in the county of York, and for an order on the defendants in that action to deliver up possession of certain parts thereof, and for an injunction to restrain them from continuing in possession thereof.

The Attorney General subsequently filed an information and bill in this Division, against the plaintiffs in that action, from which it appeared that the Crown claimed the foreshore of the river Humber, and had leased the part claimed in the action above mentioned to the Humber Conservancy Commissioners, who had underleased to the Guild or Brotherhood of Masters and Pilots.

Sir John Holker, A.G., Sir Hardinge Giffard, S.G., W. W. Karslake, and *C. Bowen*, in support of the application. They cited

Attorney General v. *Barker* (1), and relied upon the absence of anything in the Judicature Acts restricting the right of the Crown to have all cases touching her Majesty's revenue dealt with in this court. They also referred to *Leonard* v. *Rogers* (2); *Attorney General* v. *St. Aubyn* (3); *Attorney General* v. *Hallett* (4); *Cauthorne* v. *Campbell.* (5)

Wills, Q.C., and *Nalder*, for the defendants, contended that the Judicature Act, 1873, s. 24, sub-s. 5, applied, and that no injunction could issue, and no transfer, except under Order LI., rules 1 and 2, by order of the Lord Chancellor or of a judge of the division to which the action is assigned, with the consent of the president of the division to which the action is proposed to be transferred. The Crown may be bound by an Act of Parliament, though not expressly named, if the words used are wide enough to include all cases of a class, and so those in which the Crown is interested: *Moore* v. *Smith.* (6)

KELLY, C.B. I think the order moved for should be made. The case of the *Attorney General* v. *Barker* (1) clearly shews that it was settled law before the Judicature Acts that it was part of the prerogative of the Crown that the Sovereign was entitled to be an actor in any litigation affecting the rights of the Crown, and to determine in the Court of Exchequer any matter in which the Crown is interested. We are called on to consider whether this prerogative is taken away or extinguished by the Judicature Acts, for if the matter is made to depend on the discretion of a judge of a court, or of the president of a division, that is inconsistent with the exercise of the right as of right, and the prerogative will have ceased to exist. The language of the Judicature Act appears to me to point to the exemption of this court as a court of revenue from the clause relating to transfer of causes. Sect. 34 of the Judicature Act, 1873, assigns to this court all causes or matters which would have been within the exclusive cognizance of the Court of Exchequer as a court of revenue; and Order LXII. exempts from the operation of the rules proceedings on the revenue side of the Exchequer Division. The exclusive

(1) Law Rep. 7 Ex. 177.
(2) Wightw. 204.
(3) Wightw. 167.
(4) 15 M. & W. 97.
(5) 1 Anstr. 205.
(6) 1 E. & E. 597; 28 L. J. (M.C.) 126.

1879

ATTORNEY GENERAL v. CONSTABLE.

jurisdiction and procedure of this court in matters affecting the revenues and rights of the Crown are therefore preserved as before the Judicature Acts, and the case of *Attorney General* v. *Barker* (1) governs the present application.

There is, however, apart from these provisions, another consideration, which is conclusive on the point, and that is, that by the common law of the realm, and from time immemorial, the prerogative rights of the Crown cannot be restricted by an Act of Parliament without express words; and in the Judicature Acts there are certainly no words which limit the right of the Crown in respect of the decision of questions affecting the revenue. The order must therefore be made absolute.

HUDDLESTON, B., concurred.

Order absolute.

Solicitors for defendants: *Collyer-Bristow, Withers, & Russell.*
Solicitor for Crown: *Solicitor to the Board of Trade.*

June 23.

BUCKTON *v.* HIGGS.

Practice—Costs of Action up to and after Payment into Court—Rules of Supreme Court, Order XXX., rule 1—*Order LV. rule* 1.

In an action for damages for breach of covenant the defendant denied the breach, and also paid money into court, alleging that it was enough to satisfy the claim. The plaintiff replied joining issue, alleging that the money was not enough, and the issues having been referred to an official referee, he reported that the money paid in was enough to satisfy the claim:—

Held, that the costs were in the discretion of the Court under Order LV. rule 1, and that the discretion in such cases ought to be exercised by allowing the plaintiff his costs of the action up to the time of payment into court, and allowing the defendant his costs of the action after that time.

Langridge v. *Campbell* (2 Ex. D. 281) discussed.

THIS was a motion by the defendant that the Court might adopt the report of the official referee, and that the defendant might have judgment on the report, and also judgment for the costs of the action and of the reference to the official referee.

The action was for breach of a covenant to keep in repair a house let to the defendant on lease, and the plaintiff claimed 500*l.* damages. The defendant traversed the breach, and denied all liability, and also paid into court 150*l.*, and alleged that that was

(1) Law Rep. 7 Ex. 177.

sufficient to satisfy the plaintiff's claim. The plaintiff replied joining issue, and alleging that the 150*l.* was not sufficient. The issues having been referred to an official referee, he reported that the money paid into court was sufficient to cover any just claim which the plaintiff had in respect of the dilapidations, the subject of the action.

Nasmith, for the defendant, in support of the motion, contended that he was entitled to the whole costs of the action on the authority of *Langridge* v. *Campbell*. (1)

[KELLY, C.B. The plaintiff has been compelled to bring this action in order to get the 150*l.* The defendant ought to have paid that sum before action. In *Langridge* v. *Campbell* (1) the costs of the cause were "to abide the event." There were no pleadings, and I expressly limited my decision to cases in which there were no pleadings.

HAWKINS, J. In that case I decided at chambers that the plaintiff ought to have his costs of the action up to the time of payment into court, and the defendant his costs after that time, and I have never changed my opinion.]

A. Powell, for the plaintiff, contended that the costs were in the discretion of the Court under Order LV., and that the plaintiff ought at least to have his costs up to the time of payment into court.

PER CURIAM (Kelly, C.B., and Hawkins, J.). The costs are in the discretion of the Court under Order LV. rule 1, and the proper mode of exercising that discretion in such cases is by directing that the plaintiff have his costs of the action up to the time of payment into court, and that the defendant have his costs of the action after that time.

Order absolute that judgment be entered for the defendant in accordance with the report of the official referee, with costs of action from the date of payment into court and of the reference; the plaintiff to have costs of action up to payment into court.

Solicitors for plaintiff: *S. W. Johnson & Son.*

Solicitors for defendant: *Keighley, Shea, & Bevan.*

(1) 2 Ex. D. 281.

1879
May 2.

[IN THE COURT OF APPEAL.]

MYERS *v.* DEFRIES AND OTHERS.
SIDDONS *v.* LAWRENCE.

Practice—Costs—Order LV.—Jurisdiction of Divisional Court to entertain an Application for Costs after Trial.

The Divisional Court has under Order LV. an original jurisdiction to make an order to deprive a successful party of the costs of an action tried before a jury.

The decisions of the Queen's Bench Division and Exchequer Division affirmed.

MYERS *v.* DEFRIES.

ACTION for maliciously and without reasonable and probable cause presenting a petition in the county court of Surrey holden at Croydon, praying that the plaintiff might be adjudicated a bankrupt; also for libel, and slanders, and trespass.

Defence, a denial of the statements in the claim: that the trespass was committed in execution of an order of the Registrar of the County Court of Surrey holden at Croydon: that the words complained of were not libellous.

Issue thereon.

At the trial before Cockburn, C.J., during the Trinity Sittings, 1877, at Westminster, the jury found a verdict for the plaintiff with 250*l.* damages. The Exchequer Division in the following Michaelmas Sittings ordered a new trial. At the second trial before Huddleston, B., during Easter Sittings, 1878, at Westminster, the learned judge directed judgment to be entered for the defendants on the counts for malicious prosecution and trespass, and for the plaintiff on the count for libel with one farthing damages. The learned judge made no order at the trial as to costs. The plaintiff signed judgment for one farthing, made out his bill of costs for taxation and obtained an appointment before the master claiming to be entitled to costs, on the authority of *Garnett* v. *Bradley*. (1)

On the 17th of March, 1879, an order was made by the Exchequer Division at the instance of the defendants, that the plaintiff have no costs of the action, and that there be no costs of the motion on either side.

The plaintiff appealed.

(1) 3 App. Cas. 944.

SIDDONS *v.* LAWRENCE. (1)

ACTION for malicious prosecution.

At the trial before Cleasby, B., at the Spring Assizes for the county of Rutland on the 19th of March, 1878, the jury found a verdict for the plaintiff damages one farthing. (2) The plaintiff signed judgment in June, and on the 22nd of that month delivered his bill of costs and made an appointment before the master for its taxation: at the defendant's request the taxation was delayed until the 3rd of July, when the plaintiff obtained the master's allocatur. On the 3rd of July, the defendant obtained an order for a stay of execution and gave the plaintiff notice that a motion would be made to deprive him of his costs. On the 23rd of December the Queen's Bench Division gave judgment that the plaintiff do bear and pay his own costs of the action.

The plaintiff appealed.

Murphy, Q.C., and *Clay*, for the plaintiff in the first case. The true construction of Order LV. (3) is that the judge at the trial, for good cause shewn, has jurisdiction over the costs of a cause subject to an appeal from his decision to the divisional Court: but in the present case the judge made no order as to costs,

(1) The Court desired that these cases should be argued together.

(2) 4 Q. B. D. 100.

(3) Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the judge before whom such action or issue is tried or the Court shall otherwise order.

Judicature Act, 1873, s. 49: "No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

Appellate Jurisdiction Act, 1876, s. 17: "On and after the 1st day of December, 1876, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceeding on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place."

1879

MYERS v. DEFRIES.

SIDDONS v. LAWRENCE.

and the divisional Court has no original jurisdiction over costs when the cause is tried by a jury. And if a case comes before a divisional Court with a view of altering an existing finding, or granting a new trial, or on a motion for judgment, in all these cases that Court would under the words of Order LV. have power to deal with the costs. Under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17, it is the intention of the legislature that all proceedings arising out of an action should be dealt with by a single judge, and should not come before a divisional Court, therefore the judge at the trial was bound to deal with the costs, and as he has not dealt with them the plaintiff is entitled to them and cannot be deprived of them. There is no express authority on the point except the cases of *Bowey* v. *Bell* (1), and those cases argued at the same time and reported with that case; from which the present case is virtually an appeal. The same point was raised in *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2), and *Baker* v. *Oakes* (3), but it was unnecessary to decide it; the opinions expressed by judges in those cases are obiter dicta.

Graham, for the plaintiff in the second case. This case differs from *Myers* v. *Defries* in this respect, that judgment has been signed, the costs taxed, and the plaintiff has the master's allocatur, he could have therefore issued execution for the damages and costs. After judgment signed and while it is in existence, there is no power in a judge or in the divisional Court to deprive the plaintiff of his costs. The reasonable construction of Order LV. is that if an action is tried and determined by the finding of the jury then the costs follow the event, or are in the discretion of the judge; but if an issue is tried it may or may not determine the action, and then it would come before the divisional Court, who would have to decide upon the question of costs. The words "for good cause shewn," overrides the whole sentence, and neither Court nor judge can deal with the costs except upon good cause shewn. Here the judgment is for damages and costs, and is a valid judgment which cannot be got rid of, and as long as it stands the plaintiff cannot be deprived of costs. If, on the 3rd of

(1) 4 Q. B. D. 95. (2) 2 Ex. D. 467.

(3) 2 Q. B. D. 171.

July, the plaintiff had issued execution, it would have been valid. The object of s. 17 of the Appellate Jurisdiction Act, 1876, was to husband the strength of the divisional Courts, and take away from them all jurisdiction in matters which arose out of an action, and all business which arises out of an action must be dealt with by a single judge. The divisional Court and this Court have no jurisdiction to deprive the plaintiff of his costs.

Gates, Q.C., and *E. Pollock*, for the defendants in the first case. The construction to be put on Order LV. is correctly stated by Cockburn, C.J., in *Baker* v. *Oakes*. (1) It is that by "Order LV., provision is made that, as a general rule, on a trial by jury, costs shall follow the event, but it is to be in the power of the judge on application at the trial, to make any order as to costs which he may think proper, where in his opinion the circumstances justify a departure from the general rule. There is also a power given to the Court to make an order to deprive a successful party of his costs to which he would otherwise be entitled by the event of the trial." That is the true view of Order LV., and the same construction has been put on it by the judges of the Exchequer Division in *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2) If the divisional Court has jurisdiction, there can be no appeal, for it is taken away by s. 49 of the Judicature Act, 1873.

C. A. Cripps, for the defendant, in the second case. Under Order LV., there are two original jurisdictions created with regard to costs. One in the judge at the trial, the other in the divisional Court. It is perhaps possible to read the sentence as conferring on the divisional Court a jurisdiction original or appellate, but the use of the disjunctive particle "or" shews that the more correct construction is to read it as conferring an original jurisdiction. [He referred to the judgment of Lord Blackburn in *Garnett* v. *Bradley* (3), as shewing that the power of the Court was discretionary.]

BRAMWELL, L.J. I am of opinion that these appeals ought to be dismissed.

It must be admitted that the words "or the Court shall other-

(1) 2 Q. B. D. 171. (2) 2 Ex. D. 467.
(3) 3 App. Cas. at p. 964.

1879

MYERS v. DEFRIES.

SIDDONS v. LAWRENCE.

wise order," must have some meaning, and the question is do they mean that there shall be an appeal to the Court from the judge, which is one meaning which has been attributed to them during the argument, or do they mean that there is an independent power in the Court to have discretion over the costs. I am of opinion that the latter is the meaning, and I am further of opinion that it is absolutely necessary that those words "or the Court" should be inserted in the clause. The proviso of Order LV. is "That where any action or issue is tried by a jury the costs shall follow the event unless upon application made at the trial, for good cause shewn, the judge before whom such action is tried or the Court shall otherwise order." Therefore that provides that where any action or issue is tried by a jury the costs shall follow the event. The word "event" cannot mean the event of the verdict, because it is possible that upon the only question in issue before the jury, the verdict might be for one party and yet the judge upon the whole case might give judgment for the other. Therefore it cannot possibly mean that the costs of the action shall follow the verdict of the jury, otherwise the most unjust consequences might ensue. I assume it must mean this: that where any action is tried by a jury the costs of the cause shall follow the event of the cause. If that is the meaning, I think that "the Court" must have the power "to otherwise order," because the event of the cause may not be known to the judge before whom the action is tried, and he may not be able to tell what the event will be. A particular issue only may be sent down for trial by a jury, and it may be that the judge may not be able to pronounce judgment at the time. Therefore it seems to me necessary that the words "unless the Court shall otherwise order," should be inserted in the clause.

Then there is another possible condition of things which seems to me to shew it is necessary. Let us suppose something is presented to the Court which was not in evidence before the judge at the trial, and the Court were to say, if that circumstance had been brought before the judge at the trial it would have been good cause, but as it was not before him at the trial he did not act upon it. I will give a familiar illustration. Suppose a man brings an action against a newspaper for libel, in which he gets

the verdict with 40*s.* damages; and the judge holds that the plaintiff had good cause for bringing the action, the jury having found not the contemptuous verdict of a farthing, but having given 40*s.* damages; and the judge therefore gives the plaintiff his costs. Then suppose that the same plaintiff brings another action against another newspaper for the same libel and obtains a verdict with 40*s.* damages; and that this second action is unnecessary and wanton, but that the judge, through no fault of the defendant, knows nothing of the former action, and has not materials before him to influence his judgment as to costs, and declines to make any order. I think that under those circumstances it would not be reasonable to say that the Court should not have jurisdiction to deal with the costs on new materials before them which possibly were not known to the defendant, or which for some reason or another, where there was no impropriety on his part, were not brought before the judge at the trial.

It seems to me there are two classes of cases where it is desirable the Court should have jurisdiction; one, where the event cannot be known by the judge at the trial, and therefore where he could not possibly say whether good cause was shewn to him; and another, where the event might be known to him at the trial, but where there might be some collateral circumstances which, if brought before him, might possibly have altered his opinion, but which were not brought before him then because they were not known, or for some other good reason, and which would be sufficient cause to deprive the successful party of his costs of the action. It seems to me, therefore, that those words, "or the Court," are necessary.

As matter of construction, I think it is manifest that a power is given to the Court independently of and other than that given by way of appeal from the judge, or where the case is brought before the Court on a new trial.

I desire to make a remark about the application being made at the trial for good cause. If I were to speculate upon it, I should not think it could have been the intention of the legislature that the Court should order costs only upon such materials as the judge might have acted upon; if the action were for slander and the damages were a farthing, there might be such good cause that the

1879

MYERS v. DEFRIES.

SIDDONS v. LAWRENCE.

judge at the trial might act upon it. I do not think that these words, "or the Court shall otherwise order," were inserted for the purpose of giving the Court jurisdiction to act upon materials upon which the judge might have acted if he thought fit, but that they were put in to give the Court an independent power, and they are also comprehensive enough to include a case where the judge might have acted if he had thought fit, but did not, and consequently practically they give a power of appeal from him; and the Court has the power, which in this case it has exercised, of exercising that original jurisdiction over costs which is given in the order of the Act of Parliament. I quite agree also that no Court, in acting upon that order, ought to do otherwise than consider that there was a primâ facie case in favour of the litigant in whose favour the event was; but it seems to me the effect of Order LV. is this, a general discretion over costs, a general direction that the costs are to follow the event where there is a trial by a jury, unless upon application made at the trial for good cause shewn the judge shall otherwise order, the effect of which is to take away the discretion of the Court and to put in its place the discretion of the judge in case of good cause being shewn to him; but there is a renewal of the discretion of the Court by the words "or the Court shall otherwise order," subject to this indeed, which is not expressed, but is the spirit and intention, that the Court shall not otherwise order except where upon consideration there is something to induce them to overrule that presumption which the legislature has declared in favour of the litigant, who has had a cause tried before a jury and in whose favour the event has been decided.

One word as to the Appellate Jurisdiction Act. To my mind that is clearly discretionary. There is nothing peremptory in it, and the words, "as far as practical," seem to me to corroborate that view. If not, this somewhat inconsistent consequence would follow, that the judge at the trial is only to deprive of costs for good cause shewn, whereas by these six concluding words, "as the Court shall otherwise order," when he ceases to be the judge at the trial, he has an original discretion to act, as he might have done even if those words were not there. Possibly that may be so.

I think that these appeals ought to be dismissed.

BAGGALLAY, L.J. As I understand Thesiger, L.J., agrees in the opinion expressed by Bramwell, L.J., that these appeals should be dismissed, it is immaterial to the result what view I may entertain upon the subject, but I am bound to say that during the argument I have entertained doubts as to the jurisdiction of the divisional Courts in the two cases from which these appeals have been brought, and that those doubts have not been wholly removed. At the same time, I find so great a concurrence of opinion by so many judges in cases not differing in principle from those now under our consideration, that I feel satisfied my doubts must be unfounded, although at the present moment I am not exactly in a position to say I am quite satisfied. I feel, therefore, that I cannot go so far as to say I dissent from the order it is proposed to make on these appeals.

THESIGER, L.J. In this case we have to deal with two appeals from judgments of divisional Courts, both of which divisional Courts have held that they have an original jurisdiction in regard to costs, where an issue or action has been tried before a jury, and they have exercised their discretion in both cases to deprive the respective plaintiffs of their costs. I am of opinion that they have that original jurisdiction, and that they have a discretion in the matter, with which discretion we have no power to interfere.

The main question in the case turns upon the construction which has been put upon Order LV. I confess that that Order is not altogether free from doubt, and during the argument I have myself from time to time entertained doubts as to what is its proper construction. But at the present moment those doubts have been cleared up, and I entirely concur with the views that have been expressed by Bramwell, L.J. The order in question commences by making an alteration at all events as regards causes tried in the Common Law Divisions of the High Court of Justice, or rather causes, to use the old expression, tried at common law, and it commences with a general provision "that subject to the provisions of the Act the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." That is the general rule, and so far, of course, there is no exception to the rule, and that being the general rule, s. 49 of the Judicature

1879

MYERS v. DEFRIES.

SIDDONS v. LAWRENCE.

Act of 1873 is applicable. That section provides "that no order made by the High Court of Justice, or any judge thereof, as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or judge making such order." Primâ facie, therefore, the costs are in the discretion of the Court or judge, and primâ facie there is no appeal against any exercise of their discretion. But exceptions are contained in this order that we have to construe. The first of these exceptions is one that relates to certain rules which have been acted on by the Courts of Equity previous to the Judicature Acts, and under which trustees, mortgagees, and other persons have their rights preserved by this order. The next exception which is made is one which has reference to the Common Law Divisions of the High Court of Justice. That is contained in a proviso "that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried, or the Court, shall otherwise order." In the first place, it has been contended on the part of the plaintiffs that this proviso does not constitute two tribunals, each of which has a primary and original jurisdiction, but gives the jurisdiction to the judge at the trial, with an appeal to the Court against his decision. I think that that contention is clearly not maintainable. I put aside the reasons against it, although there are several reasons, some of which have been adverted to by Bramwell, L.J.; for I prefer to rely upon the simple construction of the words, and I do not myself see how it can be contended that those words can mean anything more than this, that there are two alternative tribunals, each of which has a primary or original jurisdiction, and not one tribunal with a primary or original jurisdiction, and another tribunal to which is given jurisdiction by way of appeal.

If that contention were right it would involve, first, doing injustice to the ordinary and literal grammatical construction, and would be giving the words the meaning, "unless upon application to the judge or the Court," and therefore to a higher tribunal, and in addition to that it would involve inserting the words "or the Court by way of appeal." I also think, for another reason, that they do not mean by way of appeal, for there might be cases in

which the ultimate event would be decided by the Court and not by the judge, and consequently that there must be some primary jurisdiction given to the Court.

Then, assuming that contention not to be maintainable, the plaintiffs in both cases argued that both the judge and the Court are bound by certain conditions which are mentioned in this particular proviso; in other words, that the expression "upon application made at the trial for good cause shewn," is applicable not only to the judge before whom such action or issue is tried, but also to the Court, which is ex hypothesi to have also an original jurisdiction. I am of opinion that this contention, again, is not maintainable. I quite agree that grammatically the expression to which I have alluded may apply to both limbs of this sentence. Possibly, grammatically, it would more naturally apply to both limbs of the sentence than to one, but on the other hand, if in reading the words "upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried, or the Court, shall otherwise order," the words "before whom such action or issue is tried," were to be struck out, the sentence would really be reduced to an absurdity, for it would be this, "upon application made at the trial for good cause shewn, the judge or the Court," which, ex hypothesi, cannot be at the trial "shall otherwise order." Therefore it seems to me the real and proper reading of this latter part of the order is this, "unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried"—that part of the sentence stopping at those words—"or the Court shall otherwise order."

But then it was said, and it was this branch of the argument which for some time raised a doubt in my mind, "It may be so, but the meaning of the order is, that the Court is only to have jurisdiction over the costs in cases where the Court has seisin of the action itself and, in point of fact, is the tribunal by whom the event ultimately is determined." There again I cannot, after having heard the whole of the arguments, agree in that contention. In the first place, it again involves the insertion of words to the effect "the Court which has seisin of the action or which finally

1879

MYERS v. DEFRIES.

SIDDONS v. LAWRENCE.

determines the event." Those who drew this order had before them no doubt matters of that kind, because where they are dealing with the judge they put in the words "upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried," and, if they had intended to limit the jurisdiction of the Court to cases in which they had an actual jurisdiction over the event of the cause, I think one might fairly have expected that some words of the same kind would have been introduced, but there are no such words.

Therefore it seems to me that while the legislature has provided that there shall be, as regards cases tried by a jury, an exception that the costs shall, as a general rule, follow the event of the cause, at the same time it has given the unsuccessful party the right to go to the judge at the trial to deprive the successful party of the costs for good cause shewn, but has left the general rule as regards the High Courts of Justice untouched, and says, notwithstanding this exception, we still leave the matter to the discretion of the High Court, and therefore if the judge has not been applied to, has not made any order and has not deprived the successful party of his costs, still the High Court shall have jurisdiction to deal with the matter, and if it deals with the matter it has a discretion, with which discretion no Court has a right to interfere, looking to the provisions of s. 49 of the Act of 1873. That would be my opinion if the matter were untouched by authority, but it is confirmed by the views which have been expressed by the judges upon the point. It is perfectly true that in *Baker* v. *Oakes* (1) the point was not the point for decision; but it is equally true that both Cockburn, C.J., and Brett, L.J., did express opinions favourable to the view I have now expressed. In the case of *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2) the point was raised, although ultimately it was unnecessary to decide it. Huddleston, B., did express in very clear and distinct language a view also to the same effect as that which the Court is now expressing, and Kelly, C.B., who at that time declined to give any opinion on the point, has given an opinion on it, in one of the cases now the subject of appeal; and, finally, we have the judges in *Myers*

(1) 2 Q. B. D. 171. (2) 2 Ex. D. 467.

v. *Defries* and three judges in four other cases that came before them giving their considered opinions upon the point.

As regards the Appellate Jurisdiction Act (39 & 40 Vict. c. 59), I think, looking at the words, it is clear that the legislature did not intend to bind the Court by a hard and fast rule to decide that the judge who tried the cause shall deal with all proceedings subsequently, although it has intimated a very strong direction to that effect, which direction in most cases no doubt is to be followed, but at the same time section 17 states that the direction should be so only where practicable and convenient; and it seems to me neither practicable nor convenient in all cases that the judge at the trial should be the person to decide this question of costs.

Lastly, there is this one remaining point which arises in *Siddons* v. *Lawrence*. It is said there was final judgment signed and the costs taxed. That may be so. It may be an excellent reason for the Court not interfering at such a late stage of the proceedings, but, at the same time, if we are right in holding that the discretion given to the High Court is an absolute discretion, it follows we have no right to interfere with that discretion, although, under the particular circumstances of the case, we might think that the order ought not to have been made. I do not say in this case that is my opinion, for it is entirely unnecessary to consider it.

Appeals dismissed.

Solicitors:—

In *Myers* v. *Defries*:

G. H. & S. Brandon, for plaintiff.

J. Hands, for defendants.

In *Siddons* v. *Lawrence*:

Beaumont & Warren, for plaintiff.

Percy R. T. Toynbee, for defendant.

1879
May 13.

[IN THE COURT OF APPEAL.]

HIORT AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Damages, Measure of—Conversion.

The defendants, as warehousemen, held for the plaintiffs corn belonging to them. G., an agent of the plaintiffs, obtained sixty quarters from the defendants, promising to forward them a delivery order from the plaintiffs. T. subsequently contracted to purchase sixty quarters of corn from the plaintiffs, and having obtained from the plaintiffs a delivery order to himself, endorsed it to G. who forwarded it to the defendants as the delivery order which he had promised to send to them. T. was unable to pay for the corn, and G. never accounted to the plaintiffs for the price of the sixty quarters of corn which G. had obtained:—

Held (overruling the Exchequer Division), by Bramwell and Thesiger, L.JJ., that although there had been a conversion of the sixty quarters of corn by the defendants, the plaintiffs were entitled to only nominal damages.

By Baggallay, L.J., that plaintiffs had not been damnified, and were not entitled to any damages.

SPECIAL CASE stated by consent.

The plaintiffs were corn and grain merchants, carrying on their business at Hull and other places.

The defendants are a railway company and carriers of goods, having a station and warehouses at Birmingham.

The plaintiffs employed at Birmingham a person of the name of George Grimmett as their broker and agent, to sell grain for them in the Birmingham district; he also collected some of the accounts for them, and remitted them, when collected, to the plaintiffs by his own cheque. But the accounts he was directed to collect were generally from customers who had bought grain from the plaintiffs without paying for the previous purchase.

The plaintiffs from time to time forwarded from Hull, per North Eastern Railway Company, large quantities of grain, addressed "to our order" (i.e., the plaintiffs' order) at the defendants' station at Birmingham, and the defendants, upon the receipt of such grain, sent to the plaintiffs at Hull an advice note, the material contents of which are:

"The London and North Western Railway Company give public notice that no claim for loss or damage for which they may be liable

1879

HIORT, v. LONDON AND AND NORTH WESTERN RAILWAY CO.

will be allowed, unless the same be made within three days after delivery of the goods, such delivery to be considered complete when notice of arrival is sent to the consignee, or, if the goods be carted by the company, when they are unloaded at the door of the consignee's place of abode or business. That all goods conveyed, but which the company have not undertaken to deliver, must be removed from the company's trucks within forty-eight hours after notice of arrival is sent to consignee, or they will, after the expiration of that time, be subject to an additional charge beyond the amount due per carriage thereof of 3s. per truck per day, or part of a day, for demurrage of such truck, and be held by the company, not as common carriers, but as warehousemen at owner's sole risk.—Advice of goods—Messrs. Hiort & Brochmer. The undermentioned goods consigned to you having arrived at this station, I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and now held by the company not as common carriers, but as warehousemen, at the owner's sole risk, and subject to the usual warehouse charges in addition to the charges now advised.

"For the London and North Western Railway Company,

(Signed) "W. J. Nicholas."

Then followed the name of the firm to whom the goods were consigned, the description of goods, the marks, weight, and rate of carriage, and the total amount to be paid.

When the plaintiffs forwarded grain to Birmingham, as mentioned in the last paragraph, G. Grimmett used to take samples for the purpose of effecting sales for the plaintiffs, and in some instances had samples sent to him from Hull, and upon effecting such sales he, in due course, communicated to the plaintiffs the names of the buyers, the quantity sold, the quality, the kind, and the price; and the plaintiffs thereupon made out an invoice, and forwarded it with a delivery order upon the defendants to the purchaser, upon which he or his transferree obtained delivery from the defendants. The form of the delivery order, which was partly in print and partly in writing, was—"32, High Street, Hull.—London and North Western Railway Company, at Birmingham.—Deliver to (and then followed the description, quantity, and kind of grain) ex lots lying to our order."

1879

HIGBT v. LONDON AND NORTH WESTERN RAILWAY CO.

Occasionally the delivery orders were sent direct to the defendants, with a letter informing them that G. Grimmett had requested the plaintiffs to do so.

On the 8th of February, 1873, the manager of the defendants' goods department at Birmingham wrote to the plaintiffs: "We are receiving large consignments of oats and barley to your order here, and Mr. Grimmett frequently produces letters from you to him for the sale of the grain. Will you give us a standing order to deliver any of the grain that may be standing here to your order upon receipt of Mr. Grimmett's instructions." To this letter the plaintiffs replied: "We decline to give the standing order that you suggest, for this reason, that we purposely send grain forwarded to our order that we may the better be able to control the amount of credit given to each customer, as it is often not advisable for us to allow sales of grain to be delivered immediately, when overdue accounts are at the same time standing open, for this reason you will oblige by acting only on our transfer orders."

In June, 1873, it was discovered by the plaintiffs that between January, 1872, and June, 1873, G. Grimmett had been acting fraudulently, and had obtained large quantities of grain from the defendants, which the defendants delivered before they received the order of the plaintiffs.

This was done in the following manner: G. Grimmett would make sales to persons in his own employ, and in some instances fictitious sales to persons who did not exist, he would then present to the defendants orders for delivery, sometimes signed ostensibly by those persons, and sometimes signed by such person and indorsed by him for delivery to himself; and sometimes orders signed by himself for the plaintiffs, he not having authority to do so from the plaintiffs.

Between January, 1872, and June, 1873, the defendants delivered to the orders in the last paragraph mentioned, large quantities of grain before they received any order from the plaintiffs, but upon the orders of G. Grimmett, or persons to whom he professed to have sold grain, and G. Grimmett received the grain. In all those cases the grain was subsequently paid for by G. Grimmett.

In other cases there was a predelivery by the defendants before they received the plaintiffs' orders, and none of them have been satisfied by payment. The value of the corn thus predelivered amounts to 230*l.*, which the plaintiffs claim as damages.

The case then set out the particulars of the predelivery, of which it is necessary only to state one instance, all the others being similar in character.

On the 19th of November, 1872, fifty quarters of oats, and on the 22nd of November, 1872, ten quarters of oats, of the value together of 79*l.*, were delivered by the defendants on the orders of George Grimmett in favour of J. Sheldon as to fifty quarters; and in favour of W. J. Reeve as to ten quarters. On the 24th of November the defendants received the plaintiffs' delivery order for the same in favour of George Tarpler, the order then being indorsed over to George Grimmett by George Tarpler. Tarpler was and is debited in the plaintiffs' books with the price of the corn, 79*l.*, and he has not paid any part of it.

The plaintiffs at the time when they gave the orders and made the debits and received payments as mentioned had no knowledge of the facts that the defendants had parted with the goods before they had received the plaintiffs' orders.

The plaintiffs seek to recover 230*l.* and interest for the value of the corn which the defendants have predelivered, and for which the plaintiffs have not been paid.

The case was argued on the 21st of November, 1877, by Gully, Q.C., and Sutton, for the plaintiffs, and Dugdale for the defendants. The Exchequer Division (Kelly, C.B., and Cleasby, B.), gave judgment for the defendants.

The plaintiffs appealed.

May 1. *Gully, Q.C.*, and *Sutton*, for the plaintiffs. The defendants held the corn as bailees for the plaintiffs. Without any authority from the plaintiffs they delivered some of that corn to two persons, Sheldon and Reeve; they therefore converted the plaintiffs' goods to their use, and on the 23rd of November, 1872, the plaintiffs had a complete cause of action against the defendants. Then has anything occurred since to destroy that right of action? It will be said that because the plaintiffs had sold this

1879

HIORT v. LONDON AND NORTH WESTERN RAILWAY CO.

corn to Tarpler, and given him a delivery order on the defendants for it, which order Tarpler had indorsed to Grimmett, who lodged it with the defendants, the plaintiffs' cause of action is destroyed. How can a cause of action once vested in the plaintiffs be destroyed by some subsequent event? It cannot be that merely giving orders for the delivery of goods to a third person, who the plaintiffs are advised is a bonâ fide purchaser, where there are no goods on which the order can operate (for the defendants had already parted with them), can affect the right of action already vested. If on the 23rd of November the plaintiffs had demanded the corn from the defendants they could not have complied with the demand, and if the plaintiffs had then sued them they would have recovered its full value. The cause of action is the same at the time the writ issued as it was on the 23rd of November, 1872. It may, however, be said that the act of misdelivery was ratified by the order subsequently given to Tarpler, but the plaintiffs never knew of the conversion until a short time before the action was brought, how can they be said to have ratified an act of which they knew nothing?

[BRAMWELL, L.J. What pecuniary damage have the plaintiffs sustained by reason of the irregular deliveries which they would not have sustained if the goods had not been so delivered?]

The plaintiffs have lost the goods.

[BRAMWELL, L.J. They would have been equally lost to the plaintiffs if they had been delivered under the subsequent orders.]

The cause of action having once vested, no subsequent act of the defendants could deprive the plaintiffs of their right of action and damages for the conversion.

[BRAMWELL, L.J. So that if the goods had been delivered to the plaintiffs' nominee, who had paid for them, it is equally a conversion, and the plaintiffs can maintain their action.]

Trover would lie. As a general rule in an action of trover the plaintiff recovers the full value of the goods; the only exceptions to that rule are where the defendant has some special property in the goods; in such cases the measure of damages may be something less than the full value. But in those cases the transaction is one which arises immediately between the parties. This general rule has recently been acted on in *Mulliner*

v. *Florence*. (1) There an innkeeper had a lien on certain horses; he sold them, and he was held liable for their full value. All the cases are collected in the judgment of Denman, J., in *Johnson* v. *Lancashire & Yorkshire Ry. Co.* (2)

Dugdale (*Russell Griffiths*, with him), for the defendants. The plaintiffs are not entitled to any damages, not even to nominal damages. There has been no misdelivery; the corn has been delivered to the order of the plaintiffs, and they cannot complain that their order has been carried out merely because there was a predelivery. The defendants have done that which gives the plaintiffs a right of action against Tarpler for goods sold and delivered. If there has been a conversion, and the plaintiffs are entitled to recover, they will recover twice; once against the plaintiffs for damages of the conversion, and a second time on the contract of sale against Tarpler. But there has been no conversion. The goods have been delivered to the persons who are entitled to them and to whom the plaintiffs intended they should be delivered. How can it be said that the plaintiffs have been deprived of their goods when they have been delivered according to their own order? That order has been substantially complied with; whether the goods were delivered a day before or a day after the order was made is immaterial. The plaintiffs' remedy is against Tarpler, but as he is unable to pay, they seek to recover the price of the goods from the defendants.

Gully, Q.C., in reply.

Cur. adv. vult.

May 13. The following judgments were delivered:—

BRAMWELL, L.J. The judgment in the Court below is for the defendants. I am of opinion it ought to be entered for the plaintiffs with nominal damages. Substantially that is a judgment for the defendants, for the consequence of giving the plaintiffs nominal damages and giving them nothing, in my mind, would be the same. I do not desire to labour a matter which, according to my own statement, is one of no importance. But I cannot state my opinion that the plaintiffs are not entitled to substantial damages without stating why I think they are entitled to nominal damages. Before

(1) 3 Q. B. D. 484. (2) 3 C. P. D. 499, 506.

1879

HIORT v. LONDON AND NORTH WESTERN RAILWAY CO.

the Judicature Acts the plaintiffs would have had to establish that the defendants had been guilty of a conversion. The Judicature Acts have not altered the law. It is true, that in the forms given in the Appendix to the Rules (1) the form in lieu of the old count in trover, or for conversion, is "for wrongfully depriving the plaintiff of goods, household furniture, &c." But the substance of the law remains the same, although there has been an alteration in the mode of stating it. It becomes necessary, therefore, to see whether, before the passing of the Judicature Acts, there would have been a conversion. I have frequently stated that I never did understand with precision what was a conversion; where an article is actually destroyed and consumed for the benefit of the wrongdoer, undoubtedly in that case there has been a conversion; not only according to law but according to the ordinary use of the term; but conversion afterwards was in some cases held to be something so unlike a conversion in fact that I find it impossible to give an exhaustive description as to what was or was not a conversion. I feel a difficulty in this matter, which I have referred to in several judgments I have delivered, and in which I was in the minority, but which were upheld in the Exchequer Chamber. *Burroughes* v. *Bayne* (2) and *Pillott* v. *Wilkinson* (3) are cases in which this point has been discussed, and I had occasion to express this opinion. But, speaking with reserve, I think the act of the defendants, before the passing of the Judicature Acts, would have been a conversion, and is so since. It is held that if a man disposes of property—and in law he did, if he without authority delivered it to somebody not entitled to receive it—he might be charged with converting it to his own use. A misdelivery by a carrier was a conversion; I cannot see, therefore, why a misdelivery by a warehouseman is not a conversion; so that if nothing had been done in this case but to deliver these goods to Grimmett's nominees—that is to say, if there had been no subsequent order of the plaintiffs—there would be a misdelivery, and consequently, as well as I can make out, a conversion. I also think that, technically, there was a cause of

(1) See Appendix A, pt. ii. sect. 4.

(2) 5 H. & N. 296; 29 L. J. (Ex.) 185.

(3) 2 H. & C. 72; 32 L. J. (Ex.) 201; Ex. Ch.; 3 H. & C. 345; 34 L. J. (Ex.) 22.

action against the defendants for breach of duty as warehousemen in delivering the goods without any authority. I think, therefore, that the plaintiffs are entitled to nominal damages, because a conversion cannot be purged, and if a defendant is guilty of conversion he must pay some damages. A return of the goods undoubtedly might be shewn to reduce the damages in the case of a conversion, not only where the owner voluntarily received back the goods, but where he took them back against his will. In an action of trover or conversion the practice was for a defendant to apply to the Court for a stay of proceedings on the delivery up of the goods, and on payment of nominal damages and costs; but if the plaintiff refused to accept delivery, and insisted on proceeding with his action for substantial damages, he did so at his peril, and if he failed to get substantial damages he was made to pay the costs of the action. It is clear, therefore, that on the return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion. Let me apply that reasoning to the present case. The goods have been delivered by the defendants to Grimmett's order; afterwards the plaintiffs gave a delivery order, requiring the goods to be delivered to Tarpler's order; Tarpler hands that order to Grimmett, who lodges the order with the defendants, Grimmett could not therefore, ask of the defendants that the goods should be delivered to him, because they had been already delivered to his nominee, the person to whom he requested that they might be delivered; if he made any claim against the defendants he would be met with the answer, the goods have been delivered as requested by you, and you have no title to them. Of course Tarpler can make no claim against the defendants, because Tarpler requested that the goods should be delivered to his order. If Grimmett is silenced and satisfied by what has taken place, so likewise is Tarpler. The plaintiffs are entitled to maintain an action against Tarpler, and if they sued him for goods sold and delivered, he would have no defence, because if he were to say the goods were never delivered to him, the answer would be that they were delivered to his nominee, which is equivalent to a delivery to him, and therefore he is liable for goods sold and delivered. If the plaintiffs' contention is right, the plaintiffs can allege, in this

1879

HIORT v. LONDON AND NORTH WESTERN RAILWAY CO.

action, that the goods belong to them, and the defendants have converted them to their own use; and in an action against Tarpler, that the goods are not theirs, but Tarpler's, for they have been delivered to him, and they are entitled to the price from him.

For these considerations I think that what took place is equivalent to a return of the goods. I do not mean to say it is a return, but it is in the nature of a return of the goods, and the same reason for reducing the damages to a nominal amount applies. Let me suppose this case: that on the order being lodged with the defendants by Grimmett they were to ask him if he had any authority to give the first order, and he were to reply he had no authority, and the defendants were to require Grimmett to bring back the goods, and they were to redeliver them to him. In that case it is obvious there would have been a redelivery to the plaintiffs, because, if there had been a redelivery to the defendants to hold them on their behalf, it would not be necessary to go through such a ceremony. The question is not whether, at the time of action brought, the property was in the plaintiffs; in my opinion the question is, was the property in the plaintiffs at the time of the wrongful act, assuming the wrongful act to have been a conversion?

I am of opinion that either the plaintiffs cannot maintain this action, or if they can maintain it, they are entitled only to nominal damages, and therefore they ought to pay the costs.

BAGGALLAY, L.J. The facts according to my view of the case are, certain corn was in the custody of the defendants, to be delivered by them to the order of the plaintiffs, and to their order only.

On the 19th and the 22nd of November, 1872, the company delivered out the corn to the order of Grimmett; Grimmett was the agent of the plaintiffs for certain purposes, but he was not their agent as regards giving orders for the delivery of corn. On the 24th of November an order was received by the defendants for the delivery of the same parcel of corn to Tarpler and indorsed by Tarpler to Grimmett. That was an order which the company were bound to act on. They would have been bound to

deliver the goods on the 24th of November to Grimmett's order, if they had not previously done so; but they had previously, by anticipation, on the 19th of November, delivered the goods which they would have been bound to detain on the 24th. On that view of the case it appears to me to be clear that no substantial damages can be recovered in this action.

As regards the question of nominal damages, I speak with great hesitation in expressing an opinion which differs from that of the other members of the court upon the law relating to the action of trover and conversion; but it appears to me that the case is one for substantial damages or no damages. Possibly there might have been a case for damages in respect of the interval between the 19th of November and 24th of November, but no claim is made for that in this action. The claim is simply one for substantial damages, 230*l.*, the value of the several parcels of corn. This matter appears to me to have been under consideration in the Exchequer Division, and they were of opinion not only was there no case for substantial damages, but no case for any damages, not even nominal. Fortified by this authority, I am bound to say that the judgment of the Exchequer Division is right.

THESIGER, L.J. I have entertained some doubt whether this action can be maintained even for nominal damages. But upon consideration I think it can for this reason. Stripping the case of all accidental circumstances the facts are, that the defendants, being in possession of certain goods of the plaintiffs, as bailees, were bound to keep them until they obtained the authority of the plaintiffs, the bailors, to deliver them; notwithstanding that duty they delivered them to certain persons, without any order from the plaintiffs: it is true that the delivery was made in the anticipation that subsequently a delivery order would be received from the plaintiffs, and in point of fact it was received a few days afterwards. I am of opinion, however, that the previous unauthorized act, whether it is called a misdelivery or a predelivery, whether it constitutes technically speaking a conversion, or only a breach of the contract of bailment, or of the duties which flow from the bailment, was a wrongful act in respect of which a right

1879

HIORT v. LONDON AND NORTH WESTERN RAILWAY CO.

of action vested at once in the plaintiffs, and that the right of action once vested was not divested by the plaintiffs afterwards giving the delivery order under which the defendants might have delivered the goods, and which, in truth, had been then already delivered. I think that the unauthorized act, whether it be a conversion, or whether it be a breach of contract, or a breach of duty did vest the right of action, and that there was sufficient damage in the eyes of the law to enable the plaintiffs to sue, for this reason, that they were for some days deprived of the control of their goods, to which they were entitled by their contract with the defendants, and the law presumes a damage in respect of that unlawful act. The question, however, assumes a different aspect when we consider what is the amount of damages to be recovered. The plaintiffs contend where a third person, whom the bailee may trust, and who has had dealings both with the bailee and bailor, informs the bailee that a delivery order for the delivery of goods to certain persons will in a few days be forwarded by the bailor to the bailee, and asks the latter for the convenience of all parties to deliver the goods to the persons designated, and the bailee in anticipation of the order in perfect good faith complies with the request, that although the order is afterwards forwarded by the bailor, yet they, as plaintiffs in an action of trover, are entitled to recover against the bailee the full price of the goods delivered in anticipation of the order. The mere statement of that proposition shews that it cannot be maintained; and I think that there is a complete answer to it. If it is said that the unauthorized act constituted a breach of the contract of bailment, or a breach of duty which flows from the bailment, then it follows that the bailors can only recover the damages which have resulted from the unauthorized act which constitutes that breach of contract or duty, and here it is obvious that no damages have resulted from the act of the defendants. If they had not delivered these goods at the respective dates at which they were delivered, they would have been bound by virtue of the delivery order issued subsequently by the plaintiffs to have delivered them exactly in the same way, and to the persons to whom they were delivered. The damage has not been sustained by the delivery by the defendants, but in consequence of the plaintiffs selling their goods and

authorizing the delivery of them to persons, who are liable to the plaintiffs for the price, and treated by them as liable down to the present time, but who have not paid for them.

It is said that there is some magic in the term "conversion," and the argument for the plaintiffs may be put thus: the unauthorized delivery constituted conversion; the plaintiffs have never received their goods; consequently the damage which they are entitled to recover in respect of that conversion is the full value of the goods. That argument is not sound. No doubt the action of trover has been surrounded by technicalities, which may have in some instances worked injustice. I think, however, of late the tendency of the Courts has been to treat this action with more common sense than it had been previously treated. Just as in other actions of tort it is held that a person to whom a wrong has been done can only recover the damages which flow from the wrong; so in an action of trover it is the tendency of the Courts to apply the same rule. I will refer in support of this view to the cases of *Brierly* v. *Kendall* (1) and *Chinery* v. *Viall* (2), where it was held that the person whose goods have been converted was not entitled to recover their full value. But if the technicalities which surround the action of trover are relied upon, the plaintiffs are met with a technical rule, or, indeed, with a substantial objection; if plaintiffs bring trover and recover the full value of the goods claimed, it follows from the verdict in their favour that the property in the goods is upon the satisfaction of the judgment transferred to the defendants. No doubt there are cases in which the defendant, although bound to pay the full value of the goods, yet may, owing to the way in which he has disposed of the goods, be unable to retain the goods. A plaintiff claiming goods is assumed, if he recover the full value, to be in a position to convey or transfer to the defendant the dominion over and property in the goods, so far as regards any act of his own. If that be so, how stands the matter? There was an act of conversion which gave the plaintiffs a right of action, and subsequent to that act of conversion there was a valid transfer of the property in the goods from the plaintiffs to some other person, who was entitled to hold the goods and bound

(1) 17 Q. B. 937. (2) 5 H. & N. 288; 29 L. J. (Ex.) 180.

1879

HIORT v. LONDON AND NORTH WESTERN RAILWAY CO.

to pay their price to the plaintiffs; then the plaintiffs clearly had no dominion over these goods, no property in them which they were able to transfer to the defendants upon the judgment being satisfied. It is true that the plaintiffs had a property in the goods between the time of the act of unauthorized delivery and the time when they did authorize the delivery, that is, transferred the property in the goods to the third person. It appears to me, therefore, to follow from the ordinary rules which are applicable to actions of trover that the plaintiffs are entitled to recover damages only for the deprivation of their control over the goods from the time of the unauthorized delivery; but inasmuch as it is admitted that during that period the plaintiffs sustained no damage they can only recover nominal damages.

As the substantial question raised in this special case is which of the parties shall bear the consequences of Grimmett's frauds, and this Court is of opinion that the plaintiffs ought to bear them, I think that they ought also to bear the costs of the action in which they have substantially failed.

Judgment reversed, and entered for the plaintiffs with damages one shilling, plaintiffs to pay the costs of the action.

Solicitors for plaintiffs: *Chester & Co., and Arnold & Son, Birmingham.*

Solicitor for defendants: *R. F. Roberts.*

[IN THE COURT OF APPEAL.]

1879
June 17.

AHEARN *v.* BELLMAN.
SEDGWICK *v.* AHEARN.

Landlord and Tenant—Notice to Quit.

The defendant was tenant to the plaintiff from year to year of a shop and premises; the plaintiff gave the defendant notice in writing to quit on a day terminating the tenancy. The notice contained the following clause: "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance":—

Held, by Bramwell and Cotton, L.JJ., Brett, L.J., dissenting, that the notice to quit being otherwise sufficient, it was not rendered invalid by the additional clause.

IN the first action the plaintiff sued for the recovery of a shop, premises, and show-rooms.

In the second, the plaintiff sued the plaintiff in the first action for a breach of a contract to give possession of the premises sought to be recovered in the first action.

These actions were tried before Lopes, J., at the Liverpool assizes, and the facts were as follows:—On the 1st of May, 1874, the defendant Bellman became tenant from year to year to Ahearn of the premises in question at a rent of 76*l.*, which before the year 1877 was increased to 96*l.* In 1877, the plaintiff Sedgwick offered Ahearn a larger rent; thereupon Ahearn told Bellman that an increased rent had been offered, but that he would give him the preference if he would take the premises for a term of years at the increased rent. Bellman declined this proposal, and on the 24th of August, 1877, Ahearn agreed to let the premises to Sedgwick for the term of seven years for 150*l.* a year, to commence from the time when Ahearn could obtain possession of them. On the 29th of October, 1877, Ahearn gave Bellman a written notice to quit in the following terms: "I hereby give you notice to quit and deliver up possession of the shop, premises, and show-rooms situate and being 20, Moss Street, Liverpool, and now held by you as tenant from me on or before the 1st day of May, 1878. And I hereby further give you notice that should you retain possession of the premises after the date before mentioned the annual

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance." Bellman refused to pay any increased rent, and did not give up possession of the premises on the 1st of May, and on the 13th of May Ahearn commenced the action against him for the recovery of the premises. Sedgwick also brought an action against Ahearn for breach of his agreement, alleging that he might have obtained possession if he had given a proper notice to Bellman, and that he gave no such notice. The learned judge was of opinion that the notice to quit was invalid, on the ground that the latter clause of the notice gave Bellman the option of remaining tenant upon fresh terms, and that the case of *Doe* v. *Jackson* (1) was distinguishable; and therefore in the action between *Ahearn* v. *Bellman* for the recovery of the premises he directed judgment to be entered for the defendant; and in the action between *Sedgwick* v. *Ahearn* he directed judgment to be entered for the plaintiff for 25*l.*, the agreed amount of damages.

Ahearn appealed.

C. Russell, Q.C., and *T. H. James*, for Ahearn. The first clause of the notice to quit is clear and direct in its terms, and is not vitiated by the terms of the second clause. The only authority to be found is *Doe* v. *Jackson* (1), in which the judgments of Lord Mansfield and Willes, J., are in point for Ahearn.

Gully, Q.C., and *French*, for Bellman and Sedgwick. The question is, what is the construction of the notice to quit? It offers to the tenant the option of a new bargain, and is therefore bad. The dictum of Lord Mansfield in *Doe* v. *Jackson* (1) is in point. There is a distinction between the present notice and the one in that case. There the words of the notice were: "I desire you to quit possession at Lady Day, or I shall insist on double rent:" the additional clause merely informed the tenant of the legal consequences of his holding over; but Lord Mansfield pointed out in his judgment that if the notice had really contained the option of a new agreement, and had been "or else that you agree to pay double rent," it would have been bad. That view of the law has been acted on ever since that decision. The notice in this case

(1) Dougl. 175.

in effect says to the tenant "either give up possession or make a new agreement;" it is a notice to go or stay at the tenant's option; it offers a new bargain to the tenant on the terms of an increased rent and a different mode of payment. In fact, notwithstanding the notice, the old tenancy continued in full force, for the payment of an increased rent would not create a new tenancy: *Doe* v. *Geekie*. (1) But assuming that the tenant accepted the terms, and a new tenancy was created, from what time would it commence? from the commencement of the notice to quit, or from the expiration of the old tenancy? These considerations shew that the notice is uncertain and ambiguous: if so it is bad, for all the text-books lay down the law to be that a notice to quit must be clear and unambiguous: Woodfall's Landlord and Tenant, p. 311; Adams on Ejectment, p. 95; Cole on Ejectment, pp. 46, 47.

C. Russell, Q.C., in reply. It is clear law that a notice to determine a tenancy need not be in writing; and it would be a good notice if the landlord said to his tenant, "quit at the expiration of your tenancy," and added "but I am quite willing to consider an offer of a new tenancy on the terms that you pay an increased rent and in advance." How could this latter proposal render the notice bad when it is an expression of the landlord's determination that the subsisting tenancy shall be at an end? The notice is perfectly good.

BRAMWELL, L.J. I am of opinion that these two judgments must be reversed. The question is whether the plaintiff has given a good notice to quit: it is commonly so called, because the effect of it is, that on its expiration the tenant must quit the premises, but it is in reality a notice to determine the tenancy. The notice is, "I hereby give you notice to quit and deliver up possession of the shop, premises, and show-room now held by you as tenant from me on or before the first day of May next, 1878." Nobody can doubt that if the notice had stopped there, it was effectual to determine the tenancy, and was a good notice to quit. But the notice contains this additional clause, "I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises

(1) 13 L. J. (Q.B.) 239.

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

Bramwell, L.J.

now held by you from me, will be 160*l.*, payable quarterly, in advance." I am not at all sure that that was not meant as a threat that the tenant would have to pay more rent; but I am inclined to think its more reasonable construction, especially when it contains the words "payable in advance," is that it was an offer, and I think it would have justified the defendant in treating it as an offer upon certain terms, which he might accept. Had he done so, the notice to quit, I think, would have been as efficacious as it was before, and would have put an end to the old tenancy, but there would, at the same time, have been created a new tenancy. I think there would have been no difference if the notice had been given in one letter, and the offer made in another letter at a subsequent time. I cannot understand how it can be said that an offer of a new tenancy in any way affects the validity of the notice to determine the old one; if anything it corroborates it, because it supposes that the old tenancy is gone, otherwise there would be no competency to enter into a new one. I do not think it is a continuation of the tenancy on new terms under the offer, unless the offer had been accepted, and the offer has not been accepted; on the contrary, the defendant expressly sent word that he would not accept the terms that were offered to him. Therefore, even supposing that the old tenancy would have continued if the offer had been accepted; it was not accepted, and consequently the notice to quit was valid, and nothing has occurred to prevent its operation. I am inclined to think that if the defendant had not upon the receipt of the offer accepted it, it would have been in the same condition as any other offer, it would have been an offer made but not accepted; if the offer is interpreted to mean that the tenant need not make up his mind as to whether he would accept the offer until the time arrived for his quitting, it would give him until that time for consideration, and if he continued tenant after that time it would probably be treated as evidence of the acceptance of the offer; but it is unnecessary to consider this question, for the only question is whether the tenancy affected by the notice to quit was terminated, and I am of opinion that it was, and the defendant at the time when the action for the recovery of the premises was brought was not tenant of the plaintiff.

It is laid down in Woodfall's Landlord and Tenant, and in many other authorities, "A notice to quit must be clear and intelligible"—so must every other notice and every document—then the passage goes on, "a notice to quit should be clear and certain in its terms"—of course it ought, and so ought everything else—"and not ambiguous and not optional." A notice to quit which is optional is not a notice to quit. A notice that a tenant may go or stay is not a notice to go; it is no more a notice to go than it is a notice to stay. "If a notice to quit was in these words, 'I desire you to quit or else that you agree to pay double rent,' the tenant having an option, the notice would not be sufficient. It would not have been sufficient provided he exercised the option to stay." I very much doubt whether it would; however there is the learning of Woodfall on that subject. I will say a word about notices in general. Let us suppose a purchaser were to buy goods, and part of the contract was that the vendor upon receiving notice would send them by the London and North Western or the Great Northern Railway. The purchaser writes to the vendor, "Take notice you are to send the goods by the London and North Western, and my reason for doing that is that their terminus is nearer my place of business, and therefore it will cost me less to cart them home, but if you, the vendor, like to pay me a shilling a ton you may send them by the Great Northern." Would that not be a good notice to send the goods by the London and North Western? Clearly it would, and yet it would give the vendor an option; but if he does not exercise that option he is to send them by the London and North Western. So in this case, unless the tenant does accept the option for a new term it would be a notice to quit the premises. As a matter of reasoning, I cannot bring myself to see the difficulty in this case. It is said that Lord Mansfield has decided this question favourably to the defendant. In my judgment he has done nothing of the sort. Lord Mansfield says, "That the landlord may give the tenant the alternative is clear." What alternative? The alternative of going or staying. The question is, what is the meaning of this notice? If it had contained the option of a new agreement, and had said, for instance, "or else that you agree to pay double rent," the action would not have been supported, that is to say,

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

Bramwell, L.J.

according to the words reported to have been used, the mere offer of a new agreement would prevent the notice being good. That is the conclusion that is drawn from it. I do not draw that conclusion from it. I agree that the ejectment in that case could not have been supported, and for this reason; "I desire you to quit possession, or I shall insist upon double rent;" and the man continued in possession; if there had been an offer of a new tenancy, his continuance in possession would be evidence that he had accepted that offer, and in my judgment that is all that Lord Mansfield means when he says that if the notice had contained the option of a new agreement, or said, "or else that you agreed to pay double rent," the ejectment could not have been supported. Did Lord Mansfield mean to say that if it had contained that offer, and the tenant had said, "I will not accept it; I will not stay upon those terms but will quit," that ejectment could not be supported? I find nothing in Lord Mansfield's judgment that would lead to such a conclusion. Then Lord Mansfield goes on to say, "But the landlord does not mean to offer a new bargain. I think that very point has been settled several years ago, but if it is new, I have no doubt the additional words can only prove the landlord's anxiety to get into possession. It is an emphatical way of enforcing the notice and shewing the tenant that he is in earnest by informing him of the legal consequence if he hold over, but the notice informs him that in such case the landlord will insist on the penalty. It clearly means to refer to the statute." That is how Lord Mansfield deals with this particular case, and says there was no offer; so that taking it that the tenant staying in would have been an acceptance of the offer, if there had been an offer, there was no offer. If he meant to say that an offer would vitiate the notice, in the first place, it was obiter dictum; in the next place, obiter dictum as it was, I agree to it because it means that it was an offer, and an accepted offer, to the tenant staying in possession. Then Willes, J., says, "That the notice is to be considered as having two parts: first, a common notice to quit; secondly, a warning to the tenant of the consequences." There is a notice to quit, and an offer to the tenant that he may make a new bargain if he thinks fit. Then it is said that the law has been understood, and laid down, and acted upon as contended

for on behalf of the defendant. I cannot think that it has been acted upon. I quite agree that when the law has been laid down and acted upon, especially in cases relating to real property or mercantile contracts, it is not desirable that it should be departed from. I do not hesitate to say that the point raised on behalf of the defendant is to me an entire novelty. I repeat, as a matter of principle, I cannot understand why a tenant is told, "Your tenancy now existing is terminated, and you may enter into a new one if you think fit;" and if he does not think fit to enter into it, the notice is not as good as though it had not contained that offer to enter into a new tenancy. The question appears to me, on principle, unaffected by authority, that the plaintiff was entitled to recover in this action of ejectment, and that he, as a defendant, had a good answer to the second action.

BRETT, L.J. I am of opinion that the notice to quit was bad, and therefore, had no effect in putting an end to the defendant's right to remain in possession of the premises.

This is an action of ejectment, and the plaintiff in ejectment cannot recover unless he has a right to immediate possession. It is brought by a landlord against his tenant. There was a tenancy between the plaintiff and the defendant, a tenancy from year to year, but with an implied power on the part of the landlord to put an end to that tenancy by a certain notice to be given at a certain time. The power so given to the landlord is absolute. It is given to him no doubt by the consent of the tenant, but nevertheless it is an absolute power. It is a power given to one of two persons to a contract to put an end to the contract at his sole will against and contrary to the will of the other, and it has always been held that where such a power is given to a landlord, it is given also conversely to the tenant, and the same reasoning applies. The power must be strictly followed. I cannot agree that the notice is of itself a notice to put an end to the tenancy. It is a notice which is given for the purpose of having that result, but the only notice which can put an end to the tenancy is a notice to quit possession given at a certain time and for a certain time. It is said that if a tenant accepts an offer which is made to him to pay a new rent payable at different times from that formerly payable,

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

Brett, L.J.

that then there is a new tenancy, and therefore that the old tenancy is put an end to. As far as I understand, the suggestion is that the old tenancy is put an end to at the time when the notice to quit given to put an end to that tenancy expired. With the greatest deference I differ. The time when the old tenancy would be put an end to, by reason of the parties agreeing to new terms and to a new tenancy, would be the time when that new agreement was made. It is a necessary implication that the moment they have agreed to a new tenancy they have agreed to cancel the old one; and if by a new agreement there is a new tenancy created, at that moment the old one is at an end, even before the expiration of the notice to quit, which was given to put an end to that former tenancy. The sole question, therefore, seems to me to be whether the notice to quit was a good notice; if the notice to quit possession was bad at the time it was given, then the tenant is not called upon to do anything in respect of it. He has a right to disregard it altogether. The contract between them not having been put an end to by his own will, nor in the only way in which it could be terminated against his will, he is entitled to remain in possession, because his tenancy is not at an end; and the plaintiff in ejectment, not being entitled to an immediate possession, cannot recover in ejectment.

Therefore the question seems to me to be whether the notice to quit is good. It is a notice to quit on a certain day; but in the same document, although I do not think that is absolutely material, at the same time a proposition is made to the tenant. That is not a proposition made to the tenant so that he could not do anything afterwards without the consent of the landlord. The proposition is made to him, "You are to go out of possession on the day I tell you, or you may remain in possession if you will do so on certain terms." That certainly as to quitting possession gives him an option; at all events, it was so stated in terms by Lord Mansfield, more than a hundred years ago. Lord Mansfield stated a proposition of law with regard to tenancies and with regard to notices to quit, and he stated that it was a proposition of law which he believed to have been decided before, but which at all events, he decided then as the rule which was to be the governing rule between landlord and tenant:

that if the notice to quit gives the tenant permission to remain in possession if he will accept terms then offered to him it is an optional notice, and an optional notice, as Lord Mansfield says, is a bad notice according to the law of England between landlord and tenant. He says in effect: "That is the rule I have to consider for the purpose of founding my judgment in this case, and the only way in which I can hold that the notice in the case before me is a good notice, is to say that it does not give that option. If it did give that option, I should be obliged to say that the ejectment could not be maintained. I hold that it can be maintained, because the notice before me does not give that option, but only gives a notice to quit at a proper time and mentions that which is the legal consequence if the tenant holds over." That Lord Mansfield meant to say that the notice was a bad notice, if it was in the terms which he suggested, I cannot doubt. He says so in very terms, and he only avoids the application of the rule by saying that the notice there did not come within the rule. But how has it been understood? It is admitted that it has been understood in the sense in which it is stated by every text-writer, whose books have been received as valuable books in the law from that time to the present. To say that Woodfall states a mere truism which is of no value, is not the right way to deal with such an authority. What Woodfall says is, "a notice to quit should be clear and certain in its terms and not ambiguous." It is said that every notice should be so, but that sentence of Woodfall's points to many cases which have been decided. There have been many cases in which the notices to quit have been uncertain in their terms, and there have been many notices to quit in which the notice has been ambiguous in its terms. But Woodfall goes on: "A notice to quit should be clear and certain in its terms, and not ambiguous or optional;" that is in other words, to say that a notice to quit should not be optional. That does not apply to every other notice. There may be notices which are good although they are optional; but he says in the case of landlord and tenant, a notice to quit possession which is to have the effect of altering the contract at the will of one of the parties must not be "optional." Therefore, if a notice to quit be in these terms, "I desire you to quit or else that you agree to pay double rent,

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

Brett, L.J.

the tenant having an option "—what is that option? An option to remain in possession or go out—" the notice would not be sufficient." Then he cites the case before Lord Mansfield, that is to say, he has understood Lord Mansfield to mean and say the very thing which I say I should have thought from the case he did say. Cole on Ejectment, is a book which is always received with respect, and he says the same thing in the same terms. Adams on Ejectment says the same thing. We have it that, more than a hundred years ago, Lord Mansfield stated there was a rule of law applicable to the contract of landlord and tenant, and that rule of law in the sense in which Lord Mansfield meant it, is copied and stated to be the rule of law in every text-book which has been written from that time to this: that is to say in every source to which persons could go in order to see how they are to manage their property in matters which occur from day to day.

My opinion is formed upon a ground which I have had occasion to state more than once, which is this, that where the law has been decided for years with regard to the management of property, as to its daily and constant management, or with regard to the conduct of mercantile or other business, we ought not—whether that decision is right or wrong—to alter it; because, in all probability, although it cannot be proved, there must have been many cases in which the law so laid down has been acted upon. At all events in the particular case the parties would have a right to act upon the law which has been so laid down in every place where they could look for the law, and it seems to me that it is most unjust to come to a decision against a tenant who has acted upon that statement of the law, made in a judicial decision given a hundred years ago. It seems to me that it is most unjust now to question that decision, or to question that uniform current of statement of the law and to affect a man most materially, both as to his property and as to the results of a suit, by stating, at the end of a hundred years, that that which everybody has understood to be held by Lord Mansfield was not held by him, or to state that what was held by Lord Mansfield was bad law. Inasmuch as that decision related to the management of property, just the same as if it had related to the management and conduct

of business, in my opinion it ought not to be altered. It cannot, to my mind, be pretended that this case is really different from the case stated by Lord Mansfield. It is exactly within the rule of law laid down by him as the rule of conduct between landlord and tenant, and therefore, in my opinion, Lopes, J., was right in following the decision of Lord Mansfield, and his judgment ought to be affirmed.

COTTON, L.J. I am of opinion that the plaintiff in this first action is entitled to judgment, and that the judgment appealed from must be reversed.

The question is whether or no the yearly tenancy of the defendant was determined before the action was commenced; as, if it was, the defendant had no title to the possession of the premises. What, then, is a yearly tenancy? It is a tenancy for a year, and so on from year to year, unless either of the parties by notice given in due time determines the tenancy. Anything passing from one to the other in due time, which gives a notice to the other party that the tenancy between them is to be at an end, whether given by the landlord to the tenant or by the tenant to the landlord, puts an end to the tenancy. There is no authority which has been referred to shewing that any special form is required, and in reason or sense no special form is required.

No doubt the notice by which a tenancy is determined is usually called a notice to quit. It is called a notice to quit, I take it, for two reasons: first, that whatever the form of the notice is, unless the tenant gets some new agreement with the landlord which entitles him to continue in possession, the result or consequence of the determination of the tenancy is that he must quit, and if he does not quit, the landlord may treat him as a trespasser. But usually a notice to determine a tenancy is given in the form of a notice to quit; that is to say, that the landlord says to his tenant, "At the end of the current year of your tenancy I shall require you to give up possession and quit;" and, on the other hand, the tenant tells his landlord that he intends to quit. It is not of necessity that the form should be in a certain way, or that of

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

Cotton, L.J.

necessity after the determination of the tenancy the tenant must quit. He only must do so unless there is some new agreement entered into between him and the landlord, but if there is no new agreement entered into between them after the tenancy from year to year existing when the notice to determine was given has expired, the landlord is entitled to take possession of the land.

Then it has been said, and truly said, that a notice to determine the tenancy must be clear and unambiguous; but that does not at all, in my opinion, mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else; notice to quit must be clear and unambiguous, so as to shew the tenant what the landlord has bound himself to do—no longer to require of the tenant to pay rent or to be treated as a tenant; and if a notice does not definitely state that the landlord will no longer require the rent and treat the person to whom it is sent as tenant under the then existing tenancy after the day named, undoubtedly it is bad. For instance, take this example. Supposing the notice relied upon was this: "If you are dissatisfied you can give up possession." It cannot be said that that would be a good notice, because it is merely stating to the tenant what he may do if he is dissatisfied, and it binds the landlord to nothing. It does not say, "After the end of the year I shall not look to you for rent, I shall not look to you as my tenant." So as to one of the cases in Woodfall referred to, which was not a yearly tenancy, but the case of the breach of some covenants in a mining lease, where the landlord said, "Unless you employ a larger number of workmen I shall determine your tenancy;" that would not be a good notice, because that means, "If you still continue, as I think you are now doing, to break the covenants or conditions, I shall exercise my rights." That binds the landlord to nothing. He does not so determine the tenancy; and it is still open to him to say, "Notwithstanding the threat I then held out, I continue to look upon you as my tenant, and as such liable to me for the rent."

In the present case we have, in the first paragraph of the document of the 29th of October, a clear and certain notice to quit, a

notice indicating the intention and determination, and fixed purpose of the landlord that the then existing tenancy shall be at an end on the 1st of May. No doubt, that binding him, he could not afterwards say he had not put an end to that tenancy; but then, on the same sheet of paper, but in a separate and distinct paragraph, the landlord gives a further notice, not as in any way modifying or affecting that first notice, but, in my opinion, as offering new and distinct terms to the person who was tenant. He says to him, "The tenancy under which you have held hitherto is at an end from the 1st of May, but if you like to enter into a new tenancy with me, I am quite ready to do so." It would be quite impossible for the plaintiff after that to turn round and say, "I still continue to treat you as holding under the existing tenancy." If that fresh offer had been on a separate piece of paper, I hardly think it could be contended that it would then vitiate the notice to quit. If it is on the same piece of paper, but in an entirely separate paragraph, not in any way qualifying the notice to quit, though it does qualify, possibly, the effect and consequence of the notice to quit, because it enables him to enter into a fresh agreement, then, in my opinion, that offer does not vitiate it, or in any way allow the tenant to say that the first paragraph does not put an end to the tenancy, any more than it allows the landlord to say, "Notwithstanding the first paragraph of the notice, I still hold you as my tenant under the tenancy from year to year existing on the 29th of October, 1877, when I sent the notice." That being so, I hold that this notice was good, and it is not necessary here to say, as a general proposition or rule, what would be the effect of an agreement to pay an increased rent on a tenancy of a yearly tenant. But in this case I do say if the defendant had accepted the offer, if it be an offer, in the latter paragraph of the notice that then it would have been a new tenancy, the previous tenancy having been determined by the notice contained in the first paragraph of it. So that in this case if it is necessary to give an opinion on the point, I do hold that there would have been a new tenancy and not a continuance of the old tenancy, a larger rent being paid.

I ought to say a word or two upon the decision of Lord Mansfield

1879

AHEARN v. BELLMAN.

SEDGWICK v. AHEARN.

Cotton, L.J.

and the text-books which have been so pressed upon us. No doubt anything Lord Mansfield says is entitled to the greatest weight, but I doubt whether if this case had been before him he would have expressed an opinion in any way inconsistent with that which Bramwell, L.J., and I have come to. Certainly it is not a binding decision upon us, and no decision or case is found in the books which lays down that a notice to quit, clear and unambiguous in itself, is made ineffectual because it is accompanied, although in the same piece of paper, yet in a distinct and separate paragraph, with an offer for a new tenancy. I do not think that Lord Mansfield there meant to lay down the notice to quit was bad. If it had been in a certain form: "You must give up possession or agree to pay a larger rent," then if the tenant remained in possession the action of ejectment might have failed, because there was evidence to go to the jury that he had accepted that offer and was entitled to possession, and the landlord was not in a position to treat him as a trespasser, even though the old tenancy had terminated.

Now as regards the text-books, I cannot in this case be influenced by the consideration that this matter occurred in the management of property. If the decision had laid down a rule which had affected the titles of estates, or if one could see that contracts which had been acted upon would be vitiated by any decision of ours, that would be a different matter; but the simple question is this, whether or no a form of notice of the determination of the tenancy from year to year is or is not good in such a case as this. I think too much importance has been attached to the way in which that case of Lord Mansfield is dealt with in the text-books as affecting titles to property. If we think that the text-books do not lay down a correct rule it is our duty to lay down a correct rule, and to decide this case according to the rights of the parties and according to law.

BRAMWELL, L.J. I should wish to add one remark. Let us suppose that the tenant had given a notice to quit sufficient in its terms, and had said, "But I am willing to continue in possession and will, if you will let me, at the diminished rent of so much."

Could there have been any doubt that that would have been a good notice on the part of the tenant?

Appeals allowed. (1)

Solicitors for plaintiff: *Walker, Son, & Field, for Peacock, Cooper, & Gregory, Liverpool.*

Solicitor for defendant: *Fildes, Liverpool.*

[IN THE COURT OF APPEAL.]

March 26.

DAVIS *v.* GODBEHERE.

Practice—New Trial—Action remitted to County Court—Rules of Court, Order XXXIX., rule 1—19 *&* 20 *Vict. c.* 108, *s.* 26.

In an action commenced in a Divisional Court, and remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, and tried by a judge without a jury, an application for a new trial must be made to a Divisional Court, and not to the Court of Appeal.

London v. *Roffey* (3 Q. B. D. 6) approved.

AN action commenced in the Exchequer Division of the High Court of Justice had been remitted under 19 & 20 Vict. c. 108, s. 26, to a county court to be tried. The cause was tried by the judge without a jury, who decided in favour of the plaintiff. After the trial the registrar of the county court certified the result to the Master of the Exchequer Division, and judgment in accordance with the certificate was signed.

Graham, moved on behalf of the defendant for a new trial, on the ground that the finding of the judge was wrong. He contended that the application was rightly made to the Court of Appeal under Order XXXIX., rule 1, for although the action was remitted to the county court to be tried, yet the judgment would be signed and the costs of the action taxed in the High Court. The action, therefore, remained in the High Court, and under Order XXXIX., rule 1, where in an action in the Divisional

(1) Judgment was entered in *Ahearn* v. *Bellman* for the plaintiff with 150*l.* mesne profits; in *Sedgwick* v. *Ahearn* for defendant; with order for costs, and costs in the Court below.

1879

DAVIS v. GODBEHERE.

Courts the trial had been by a judge without a jury, the application for a new trial must be to the Court of Appeal. He contended that *London* v. *Roffey* (1) ought to be overruled.

PER CURIAM. (2) The word "judge" in Order XXXIX., rule 1, means a judge of one of the Divisional Courts, and when we look at the context it is clear that it does not apply to a judge of the county courts. The order, therefore, has no application to trials before a county court judge without a jury; the motion ought to have been made to the Exchequer Division.

Motion refused.

Solicitor for defendant: *Percy R. T. Toynbee, agent for Toynbee, Larken, & Co., Lincoln.*

July 1.

[IN THE COURT OF APPEAL.]

THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) *v.* GRANT.

Company—Allotment of Shares—Letter of Allotment posted, but not received—Post Office, Agent of Parties contracting by Letter.

The defendant applied for shares in the plaintiffs' company. The company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:—

Held, by Baggallay and Thesiger, L.JJ., Bramwell, L.J., dissenting, that the defendant was a shareholder.

British and American Telegraph Co. v. *Colson* (L. R. 6 Ex. 108) overruled.

ACTION to recover 94*l.* 15*s.* being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares dated the 30th of September, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for

(1) 3 Q. B. D. 6. (2) Brett and Cotton, L.JJ.

shares in the plaintiffs' company, which stated that the defendant had paid to the bankers of the company 5*l.*, being a deposit of 1*s.* per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19*s.* per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence 16, Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the 5*l.* mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of 5*l.* for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5*s.*, was also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury. 1. Was the letter of allotment of the 20th of October in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop* v. *Higgins*. (1)

The defendant appealed.

May 22. *Finlay* and *Dillwyn*, for the defendant, contended that the defendant was not a shareholder, for it was necessary that the allotment of shares should not only be made but also communicated to the defendant; that a letter posted but not received

(1) 1 H. L. C. 381.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

was not a communication to the defendant of the allotment, and that there was therefore no contract between the parties.

Wilberforce, and *G. Arbuthnot* (*W. G. Harrison*, *Q.C.*, with them), for the plaintiffs, contended that the contract was complete by acceptance when the letter was posted, and that the plaintiffs were not answerable for casualties at the post office preventing the arrival of the letter.

In addition to the authorities mentioned in the judgment, the following cases were cited during the argument: *Reidpath's Case* (1); *Townsend's Case* (2); *Wall's Case* (3); *Gunn's Case* (4); *Dunmore* v. *Alexander* (5); *Pellatt's Case* (6); *Ex parte Cote* (7); *Taylor* v. *Jones* (8); Pollock on the Law of Contracts, p. 13.

Cur. adv. vult.

July 1. The following judgments were delivered:—

THESIGER, L.J. In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court.

The leading case upon the subject is *Dunlop* v. *Higgins*. (9) It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did

(1) Law Rep. 11 Eq. 86.
(2) Law Rep. 13 Eq. 148.
(3) Law Rep. 15 Eq. 18.
(4) Law Rep. 3 Ch. 40.
(5) 9 Shaw & Dunlop, 190.
(6) Law Rep. 2 Ch. 527.
(7) Law Rep. 9 Ch. 27.
(8) 1 C. P. D. 87.
(9) 1 H. L. C. 381.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Thesiger, L.J.

rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so the Court is as much bound to apply that principle, constituting as it did a ratio decidendi, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said (1), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop* v. *Higgins* (2) is that taken by James, L.J., in *Harris' Case* (3), there (4) he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment," he adds, the Lord Chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete and neither party can afterwards escape from it." Mellish, J., also took the same view, he says (5) "in *Dunlop* v. *Higgins* (2) the question was directly raised whether the law was truly expounded in the case of *Adams* v. *Lindsell*. (6) The House of Lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of

(1) 1 H. L. C. at p. 399.
(2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.
(4) At p. 592.
(5) At p. 595.
(6) 1 B. & A. 681.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Thesiger, L.J.

a bill of exchange notice of dishonour, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to *Stocken* v. *Collin* (1) on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams* v. *Lindsell* (2), and quoted the observation of Lord Ellenborough, C.J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris' Case* (3) for the moment, I turn to *Duncan* v. *Topham* (4), in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post office and lost by the negligence of the post office authorities, the contract would nevertheless be complete; and both he and Wilde, C.J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop* v. *Higgins* (5). That opinion therefore appears to me to constitute an authority directly binding upon us. But if *Dunlop* v. *Higgins* (5) were out of the way, *Harris' Case* (3) would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams* v. *Lindsell* (2), which is recognized authority upon this

(1) 7 M. & W. 515.
(2) 1 B. & A. 681.
(3) Law Rep. 7 Ch. 587.
(4) 8 C. B. 225.
(5) 1 H. L. C. 381.

branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case* (1), when in the course of his judgment he said: "*Dunlop* v. *Higgins* (2) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post office is the common agent of both parties." Alderson, B., also in *Stocken* v. *Collin* (3), a case of notice of dishonour, and the case referred to by Lord Cottenham, says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in the *British and American Telegraph Co.* v. *Colson* (4), which was a case directly on all fours with the present, and in which Kelly, C.B., (5) is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the Court, if the letter

(1) Law Rep. 4 Eq. at p. 12.
(2) 1 H. L. C. 381.
(3) 7 M. & W. at p. 516.
(4) Law Rep. 6 Ex. 108.
(5) At p. 115.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Thesiger, L.J.

of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is *Potter* v. *Sanders*. (1) And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by Mellish, L.J., in *Harris' Case* (2) how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in *Harris' Case* (2) as well as in *Dunlop* v. *Higgins* (3), can really not be reconciled with the decision in the *British and American Telegraph Co.* v. *Colson*. (4) James, L.J., in the passage I have already quoted (5) affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers, with approval, to *Hebb's Case*. (6) There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent they had sent it through the post office, the applicant would have been bound although the letter had never been delivered. Mellish, L.J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the *British and American Telegraph Co.* v. *Colson* (4), that although

(1) 6 Hare, 1.
(2) Law Rep. 586, at p. 596.
(3) 1 H. L. C. 381.
(4) Law Rep. 6 Ex. 108.
(5) *Harris' Case*, Law Rep. 7 Ch. 592.
(6) Law Rep. 4 Eq. 9.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Thesiger, L.J.

a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract as he says (1), is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden* v. *Directors of Metropolitan Ry. Co.* (2), "put it out of his control and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the

(1) At p. 596. (2) 2 App. Cas. 666, 691.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Thesiger, L.J.

person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Tayloe* v. *Merchants Fire Insurance Co.* (1), more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L.J. I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop* v. *Higgins*, in the House of Lords (2), and *Harris' Case* (3), in the Court of Appeal in Chancery, that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. Lopes, J., was of opinion that the principle

(1) 9 Howard S. Ct. Rep. 390. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Baggallay, L.J.

was applicable to such a case, and gave judgment in favour of the plaintiffs, and from such judgment the present appeal is brought.

In support of his appeal the defendant relies upon the decisions of the Court of Exchequer in the case of the *British and American Telegraph Co.* v. *Colson* (1), to which, for conciseness, I will refer as *Colson's Case*. (1) I propose to consider *Dunlop* v. *Higgins* (2) and *Colson's Case* (1) and *Harris' Case* (3) somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's Case* (1) is consistent with the decisions of the House of Lords and of the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of *Dunlop* v. *Higgins* (2) were as follows: After a preliminary correspondence Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th of January, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2000 tons of iron pigs at 65s. per ton net. This letter reached Higgins & Co. at 8 A.M. on the 30th of January, and on the same day they replied by letter duly addressed to Dunlop & Co. in the following terms: "We will take the 2000 tons pigs you offer us."

It appeared by the evidence that the first post for Glasgow, after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 P.M. on the 30th, and that the post next following left at 1 A.M. of the 31st, and also that a letter despatched by the former post would in due course arrive at Glasgow at 2 P.M. on the 31st, and by the latter in time to be delivered at 8 A.M on the 1st of February. The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 P.M. post, and was despatched by the 1 A.M. post on the 31st. In due course it should have been delivered in Glasgow at 8 A.M. on the 1st of February, but it was not in fact delivered until 2 P.M. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared, also, that Higgins & Co., by mistake, dated their letter as of the 31st of January instead of the 30th of

(1) Law Rep. 7 Ex. 108. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Baggallay, L.J.

January. On the 1st of February, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co., "We have your letter of yesterday's date, but are sorry that we cannot now enter the 2000 tons, our offer not being accepted in time." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop & Co. was that their letter of the 28th should have been answered by the first post, viz., by that which left Liverpool at 3 P.M. on the 30th, but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 P.M. on the 1st of February.

On the trial before the Lord Justice General, he admitted evidence to shew that the letter of acceptance, though dated the 31st, was in fact written and posted on the 30th of January, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first to the Court of Session and thence to the House of Lords. The jury found for the plaintiffs; that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and having so found they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were therefore taken by the defendants, and, amongst other grounds of exception, they objected to the admission of evidence as to the posting of the letter on the 30th of January, and to the direction of the Lord Justice General, to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed, and the ruling and direction of the Lord Justice General were upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is observed that the direction of the judge went further, for he ruled that if their letter was duly posted they were

not responsible for any casualties in the post office establishment. During the argument Lord Cottenham said, "The question is whether putting in the post is a virtual acceptance, though by the accident of the post it does not arrive;" and, in moving the judgment of the House, he observed, "if a man does all that he can do, that is all that is called for; if there is a usage of trade to accept such an offer and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do; how can he be responsible for that over which he has no control?" There is nothing in the language of Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms: "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and acceptance is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time it has been held quite sufficient; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." Having regard to the passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his ratio decidendi, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer.

I desire however to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop* v. *Higgins* (1) which has been sometimes adopted, and as I think without sufficient reason, viz. that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision in *Dunlop* v. *Higgins*. (1) On the contrary, I think that the principle

(1) 1 H. L. C. 381.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Baggallay, L.J.

established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized. In *Dunlop* v. *Higgins* (1) the previous correspondence between the two firms was, in my opinion, quite sufficient, not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated, and it was in consequence of the jury finding it as a fact that Higgins & Co. posted their acceptance of the offer to Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direction of the judge. The principle involved in *Dunlop* v. *Higgins* (1) was recognised by Cresswell, J. upon the trial of the action in *Duncan* v. *Topham* (2); upon that occasion he directed the jury that, if the letter accepting the contract was put into the post office and lost through the negligence of the post office authorities, the contract would nevertheless be complete; and upon an application in the same case, to make absolute a rule which had been obtained for a new trial, though the new trial was ordered upon other grounds, Wilde, C.J., and Maule, J., expressed views to the same effect as the direction of Cresswell, J.; in that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of *Colson's Case* (3), they were as follows. On the 13th of February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of 2*l.* per share on whatever number should be allotted to him; on the 15th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares, viz., 31, Charlotte Street, Fitzroy Square.

Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the

(1) 1 H. L. C. 381. (2) 8 C. B. 225.
(3) Law Rep. 7 Ex. 108.

usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post, as was expressed by Lopes, J., in the case now under consideration; such would be the ordinary mode of transmission of an allotment letter. The defendant however swore, and there was no reason to doubt the truth of his statement, that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street: about that time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On the 28th of February the plaintiffs, on being informed that the letter of allotment had not reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the 2*l.* per share. The jury found that the letter of allotment was posted to the defendant on the 14th of February but that he never received it, and that the second notice was not sent in a reasonable time. The learned judge, Bramwell, B., thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself on the authority of *Finucane's Case* (1), which had recently been decided by Lord Romilly. A rule nisi was accordingly obtained, and cause was shewn on the 17th of November, 1870, the Court being composed of the Lord Chief Baron and Bramwell and Pigott, BB. Judgment was reserved, and on the 31st of January, 1871, the rule was made absolute to enter the verdict for the defendant.

The Lord Chief Baron, in the course of his judgment, expressed himself as follows: "It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise brought to his knowledge, except in certain cases where the non-receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put by the Lord Chief Baron is to be read with some qualifications, it can hardly be considered as consistent with the decision in

(1) 17 W. R. 813.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Baggallay, L.J.

Dunlop v. *Higgins* (1), as such decision has ordinarily been understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken; for after alluding to the circumstances of *Dunlop* v. *Higgins* (1) he proceeded to express his entire concurrence with the decision of the Court of Session and in the affirmance of it by the House of Lords, upon the ground that, in his opinion, the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case; the distinction which he recognised between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop* v. *Higgins* (1) was received by the party making the offer in due time, that in *Colson's Case* (2) never reached its destination. Pigott, B., did not give a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Bramwell, B., also commented upon the circumstances of *Dunlop* v. *Higgins* (1), and referred to several passages in the judgment of Lord Cottenham, including those which I have quoted, and he then expressed himself as follows: "It seems to me that the correct way to deal with those expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs have contended for, but that when the post may be used between the parties it must be subject to those delays which are unavoidable." It would appear, then, that all the judges in the Court of Exchequer treated the case of *Dunlop* v. *Higgins* (1) as one decided upon its special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop* v. *Higgins* (1) sufficient to have justified the decision of the House, irrespective of the application of the principle involved in the direction of the Lord Justice General; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon an approval and of the direction of that learned judge.

After a careful consideration of the judgments of the Lord Chief Baron and of Mr. Baron Bramwell, I can come to no other

(1) 1 H. L. C. 381. (2) Law Rep. 7 Ex. 108.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Baggallay, L.J.

conclusion than that the decision in *Colson's Case* (1) is inconsistent with that of the House of Lords in *Dunlop* v. *Higgins*. (2) If I am right in this conclusion it is not for me to choose between the two; I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of *Harris' Case* (3), which came before the Lords Justices in 1872. On the 5th of March, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of the 16th of March posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, such summons was dismissed by Malins, V.C. From such dismissal Mr. Harris appealed, but the decision of the Vice-Chancellor was upheld. In giving judgment James, L.J., said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post, and a similar view was expressed by Mellish, L.J., who, after referring to the decision of the Court of Exchequer in *Colson's Case* (1), and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop* v. *Higgins* (2), observed, with reference to the last mentioned case, that the real question then before the House of Lords was, whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both the Lords Justices, that the decision in *Harris' Case* (3) was not necessarily inconsistent with that of the Court of Exchequer in *Colson's Case* (1),

(1) Law Rep. 6 Ex. 108. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Baggallay, L.J.

but it is, I think, clear that, although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognised the propriety of the distinction drawn by the Court of Exchequer between *Dunlop* v. *Higgins* (1) and *Colson's Case*. (2) I do not think it necessary to refer to *Finucane's Case* (3) and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than to observe that in *Finucane's Case* (3), *Dunlop* v. *Higgins* (1), and *Duncan* v. *Topham* (4) were not cited, and that in the others the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop* v. *Higgins*. (1) Indeed, in one of those cases, *Hebb's Case* (5), he distinctly recognised the authority of the decision in *Dunlop* v. *Higgins* (1), which he considered to have been decided upon the ground that the post office was the common agent of both parties. For the reasons which I have assigned, I am of opinion that the principle established by the decision of the House of Lords in *Dunlop* v. *Higgins* (1) is applicable to the case now under consideration, and that the decision of Lopes, J., should be affirmed. I desire, however, to add that I have felt myself bound by authority. My own convictions are entirely in accordance with the principles which I consider to have been established by authority; and in saying this, I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of these principles in certain suggested cases, as the equally forcible remarks made by Mellish, L.J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L.J. The question in this case is not whether the post office was a proper medium of communication from the

(1) 1 H. L. C. 381.
(2) Law Rep. 6 Ex. 108.
(3) 17 W. R. 813.
(4) 8 C. B. 225.
(5) Law Rep. 4 Eq. 9.

plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C.J., and Lord Blackburn: *Brogden* v. *Metropolitan Ry. Co.* (1)

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal, i.e., is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice.

(1) 2 App. Cas. at p. 692.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Bramwell, L.J.

Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, e.g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by cheque or banknote, and posts a letter containing a cheque or banknote to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques and banknotes to his banker by post, and posts a letter containing cheques and banknotes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognised this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C.J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or

otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not prevent the

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Bramwell, L.J.

letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is indeed a case recently reported in the *Times*, before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for nought. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post, &c.," it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L.J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in

existence before the *British and American Telegraph Co.* v. *Colson.* (1) But I wish to say a word as to *Dunlop* v. *Higgins* (2); the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop* v. *Higgins* (2) decided nothing contrary to the defendant in this case. Mellish, L.J., in *Harris' Case* (3), says, "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the *British and American Telegraph Co.* v. *Colson* (1) with *Dunlop* v. *Higgins.* (2) I do not share that difficulty. I think they are perfectly reconcilable, and that I have shewn so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in *Harris' Case* (3) might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in *Dunlop* v. *Higgins* (2) was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay shewed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the *British and American Telegraph Co.* v. *Colson.* (1) Since the last case there have been two before Vice-Chancellor Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justices had in *Harris' Case* (3) thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by

(1) Law Rep. 6 Ex. 108. (2) 1 H. L. C. 381.

(3) Law Rep. 7 Ch. 596.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Bramwell, L.J.

Lopes, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post office depend on the contents of the letter? But if the post office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post office then? But how does an offerer make the post office his agent, because he gives the offeree an option of using that or any other means of communication.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post office. The difficulty has arisen from a mistake as to what was decided in *Dunlop* v. *Higgins* (1), and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "your answer by post is only to bind if it

(1) 1 H. L. C. 381.

reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C.J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before, viz., a communication to affect a man must be a communication, i.e., must reach him.

1879

HOUSEHOLD FIRE INSURANCE COMPANY v. GRANT.

Judgment affirmed.

Solicitor for plaintiff: *Worthington Evans.*
Solicitor for defendant: *J. Davies.*

THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY, APPELLANTS; THE VESTRY OF THE PARISH OF ST. GILES, CAMBERWELL, RESPONDENTS.

June 30.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Paving New Street—Land bounding or abutting on New Street—Railway in Cutting—Bridge carrying New Street over Railway—New Street.*

A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over on a bridge from one boundary of the line to the other, but supported on stone piers erected on the slope of the cutting. On an information under s. 77 of the Metropolis Management Amendment Act, 1862, against the railway company for not contributing to the paving of the road:—

Held, that the line and the slopes of the cutting did not bound or abut upon the road within the meaning of the Act.

The line of houses adjoining the road terminated at the east end of the bridge, while after crossing the bridge there was but one cottage, and the roadway ceased to be a public thoroughfare, being closed by a private gate. A small portion of the slope of the cutting abutted on the road, between the west end of the bridge and the private gate:—

Held, that the railway company were not liable to contribute to the paving of the road, as it ceased at the eastern extremity of the bridge to be a "new street" within the meaning of the Act.

CASE stated by a magistrate of a metropolitan police court on an information preferred by the respondents under s. 77 of the Metropolis Management Amendment Act, 1862, against the appellants, for neglecting to pay a sum of money as a contribution to the paving of a new street called Chadwick Road in the respondents' parish.

1. Prior to the 30th of December, 1865, Chadwick Road ran

1879

BRIGHTON RAILWAY CO. v. ST. GILES, CAMBERWELL.

across the land now occupied by the line of the appellants, and the road was at that time a private road. On the 30th of December, 1865, the appellants, under the powers conferred upon them by the London, Brighton, and South Coast Railway (Additional Powers) Act, 1864 (27 & 28 Vict. c. cccxiv.), purchased from the owners thereof so much of the road as was required by the appellants for the construction of their line, and in place of the old road built a bridge carrying the road over their line and over the place where the road had formerly been, and raised the level of the remainder of the road so as to pass over the bridge.

2. There is a gate placed across the road on the west side thereof after the road has crossed the bridge. On it is a notice board having the words "Private—No thoroughfare," written thereon, and the road onwards from that point is still a private road. As far as that point it is a public highway.

3. On the 3rd of November, 1877, the respondents served upon the appellants a preliminary notice stating, amongst other things, that the respondents deemed it necessary that part of Chadwick Road, being a new street as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), should be well and sufficiently paved, and that the respondents were about to pave the same in pursuance of the 105th section of the first-mentioned Act, and that the contribution of the appellants towards the estimated expenses of such paving in respect of the railway abutting on the north and south sides, and also in respect of land on the south side, of which the Appellants were stated to be the owners, was 201*l.* 18*s.* 9*d.*

4. The appellants having objected to pay, the respondents served upon them three several notices requiring them to pay as their contribution towards the expenses of paving part of the road under the provisions of the said Acts the sum of 98*l.* 11*s.* 3*d.*, as owners of the London, Brighton, and South Coast Railway, for a frontage of 190 ft. 5 in. on the north side thereof, the sum of 88*l.* 12*s.* 7*d.*, as the owners of the London, Brighton, and South Coast Railway for a frontage of 173 ft. 9 in. on the south side thereof, and the sum of 14*l.* 14*s.* 11*d.* as the owners of land for a frontage of 24 ft. 9 in. also on the south side thereof.

1879

BRIGHTON RAILWAY CO. v. ST GILES, CAMBERWELL.

5. The road carried over the line of the appellants crosses it at an angle of 45 degrees, running east and west on a bridge, which is supported on stone piers erected by the railway company upon the slope of the cutting on either side of the line.

6. The first mentioned measurement of 190 ft. 5 in. is the total length on the north side thereof of so much of the road as passes over the land and railway, and cutting and land on each side thereof, of the appellant company. The second mentioned measurement of 173 ft. 9 in., and the third mentioned measurement of 24 ft. 9 in., together make the total length on the south side thereof of so much of the road as passes over the land and railway of the appellant company.

7. No portion of the land of the appellants, in respect of which it is sought to charge them as aforesaid, is at present used for any other purpose than for their railway, and the appellants make no use of Chadwick Road.

8. Throughout the length of the road, as it passes over the appellants' railway, it is carried upon the bridge.

9. It was contended on the part of the appellants:—

(1.) That the road was not a new street within the meaning of the Acts.

(2.) That the appellants were not the owners of land bounding or abutting upon the road within the meaning of the Acts, and that none of their land was land bounding or abutting upon the road within the meaning of the Acts; and

(3.) That under the provisions of the Railway Clauses Act, 1845, the appellants were themselves bound to maintain the road throughout the length in respect of which it was sought to charge them, and that, consequently, the respondents had no authority to direct such portion of the road to be paved at the expense of the appellants.

The magistrate was of opinion that the road was a new street within the meaning of the Acts, and that the appellants were the owners of land bounding or abutting upon the road within the meaning of the Acts, and ordered the appellants to pay to the respondents the sum of 201*l.* 18s. 9*d.*

The question for the opinion of the Court was whether the appellants were liable to pay that sum to the respondents.

1879

BRIGHTON RAILWAY CO. v. ST. GILES, CAMBERWELL.

1879. June 24. *Macrae*, for the appellants.

Edward Clarke (*R. V. Williams*, with him), for the respondents.

The arguments and the cases cited sufficiently appear from the considered judgment of the Court.

Cur. adv. vult.

June 30. The judgment of the Court (Kelly, C.B., and Hawkins, J.) was delivered by

HAWKINS, J. The question in this case is whether the appellants are liable to contribute towards the expenses of paving a part of Chadwick Road, in the respondents' parish, which the respondents determined to pave as a new street, under the power conferred upon them by s. 105 of the Metropolis Management Act, 1855. The appellants were sought to be made so liable as owners of land "bounding or abutting" on such street by virtue of the 77th section of the Metropolis Management Amendment Act, 1862. This liability was resisted upon three grounds:—

1st. That the appellants were not the owners of land "bounding or abutting" on the Chadwick Road.

2nd. That if they were so, that part of the Chadwick Road upon which they so bounded or abutted was not a new street within the meaning of the Act referred to.

And, thirdly, that inasmuch as the appellants were themselves bound under the Railway Clauses Act, 1845, to repair and maintain that part of the Chadwick Road upon which their lands were said to abut, the respondents had no authority to direct that portion of the road to be paved under the 105th section of the Act of 1855.

Chadwick Road was in the year 1865 a private road. In that year the appellants constructed one of their lines of railway in a deep cutting across it at an angle of forty-five degrees, and, in order to enable them to do so, purchased of the then owner so much of the road as was required for that purpose. In compliance with the provisions of the Railway Clauses Act, 1845, they carried the Chadwick Road over their cutting and railway by means of a bridge running east and west; which bridge is supported on stone piers erected by the respondents upon the slopes of the cutting.

After the road has crossed the bridge, and on the western

side of it, a gate is placed across the road on which is affixed a notice board with the word "Private" written thereon. Up to the gate, but no further, the road has now become a public road. There is a continuous row of houses along the southern side of Chadwick Road up to the eastern end of the bridge—and opposite this row of houses on the northern side are houses, a brewery and office—but at the western end of the bridge there is no building save one cottage, which is on the north side of the road, opposite to which, on the south side of the road and abutting on to it to the extent of 24 ft. 9 in., is a small piece of land belonging to the appellants, and occupied, as we were informed, as a cabbage-garden.

The open space occupied by the cutting on the northern side extends to the length of 190 ft. 5 in., and on the southern side to the length of 173 ft. 9 in.

The respondents contend that the bridge and road up to the gate are parts of a new street, which they are empowered to pave under the Metropolis Management Act, 1855, s. 105, and that the railway and cutting over which the bridge is constructed are lands of the appellants bounding or abutting upon the bridge within the meaning of s. 77 of the Metropolis Management Amendment Act, 1862. With regard to the small piece of cabbage garden, the only question is, whether the road upon which it abuts is part of a new street which the respondents are empowered to pave, for it cannot be disputed that it is land of the appellants abutting on the road.

We think it cannot be contended, after the cases of the *London and North Western Ry. Co.* v. *St. Pancras* (1) and *Higgins* v. *Harding* (2), that the banks of the cutting and the metalled surface upon which the railway is laid are not "lands" of the company within the meaning of s. 77 of the Act of 1862. We proceed, therefore, at once to consider whether, under the circumstances of the case, they can be deemed to "bound or abut upon" this Chadwick Road. For the purpose of determining this question we think some assistance may be derived from a reference to the terms of the 105th section of the Act of 1855, which imposes the obligation to contribute towards the paving of new streets.

(1) 17 L. T. (N.S.) 654. (2) Law Rep. 8 Q. B. 7.

1879

BRIGHTON RAILWAY CO. v. ST. GILES, CAMBERWELL.

By that section it is thus enacted, inter alia: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board, &c., be desirous of having the same paved, or if such vestry or board deem it necessary, &c., then and in either of such cases such vestry or board shall well and sufficiently pave the same, &c., and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." It is obvious from the language of the section that the legislature by it intended only to impose the liability of contributing towards expenses of paving any street upon the owners of houses ranged along the street itself, and opening into or contiguous to it.

This enactment, however, it will be observed, applied only to the owners of "houses" forming the street, and not to the owners of bare land, however much such land might be benefited by paving the street upon which it abutted. The 77th section of the Metropolis Management Amendment Act, 1862, was enacted to remedy this apparent injustice. By that section it is provided that "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same as well as the owners of houses therein," intending, it is clear, to place the owners of land upon the same footing as owners of houses, in other words, to make the owners of such lands liable as would have been liable under the 105th section of the 1855 Act had their lands been occupied by houses. It seems to us clear that neither the railway running under the bridge, nor the sloping sides of the cutting, can be in any sense deemed to bound or abut upon this Chadwick Road within the fair and reasonable construction of the 77th section of the 1862 Act. Could it possibly be said, if houses were erected on the spot now occupied by the railway, or on the sloping banks, that they formed part of a street with which they had no communication, and which was actually carried over them? Could the lands crossed by the high viaducts and railway bridges which are to be found in many parts of the country be said to bound or abut upon the roadway of the viaducts or bridges themselves? Or could the rivers traversed by bridges

high above them be said to bound or abut upon the roadway thereof?

In the course of the argument the case of the *London and North Western Ry. Co.* v. *St. Pancras* (1) was cited in support of the contention of the respondents. That case, however, only decided that the railway must be considered to abut upon the street, notwithstanding the fact that it was separated from it by a dead wall, which was also the company's property. The point now under discussion was not raised or suggested. That case is therefore no authority for the respondents.

This disposes of so much of the contribution as is claimed from the appellants in respect of the lands alleged to bound or abut upon the bridge itself. There remains, however, the small piece of land used as a cabbage garden, which unquestionably abuts upon Chadwick Road at the western end of the bridge. As to this the only question is, whether that part of the road can be deemed to be part of a new street. We are of opinion that it cannot. In *Pound* v. *Plumstead Board of Works* (2) Blackburn, J., says speaking of s. 105 of the Act of 1855, "I think that it is plain the legislature are here using the word 'street' in its ordinary, popular, and natural sense, and mean a place with continuous houses on each side." In *Galloway* v. *Mayor of London* (3) Lord Chelmsford said: "The word 'street' does not mean the mere roadway, but a thoroughfare with houses on both sides."

It is impossible in language to pronounce a definition of what constitutes a new street which shall be applicable to all cases. Each case must depend upon its own particular circumstances. But having regard to the facts, that the line of houses terminates at the eastern end of the bridge; that one solitary cottage alone is to be found at the western end, and that immediately after crossing the bridge from the eastward the thoroughfare ceases, and the road is closed by a private gate, we think the road ceases to be a street at the eastern extremity of the bridge, and, consequently, that the land used as cabbage garden does not abut upon a new street, and the company therefore are not liable to contribute to the paving of Chadwick Road in respect of it.

(1) 17 L. T. (N.S.) 654. (2) Law Rep. 7 Q. B. 183, at p. 194.
(3) Law Rep. 1 H. L. 34, at p. 55.

1879

BRIGHTON RAILWAY CO. v. ST. GILES, CAMBERWELL.

This objection of course applies equally to the other lands of the company, viz., the railway and banks of the cutting, in addition to the objection that they do not abut upon the bridge.

Our judgment being for the appellants, upon the grounds we have discussed, it does not become necessary for us to consider whether the liability of the company to repair the bridge under the Railway Clauses Act, 1845, would afford them in law an answer to a claim for contribution to the paving of the Chadwick Road. We abstain from expressing any opinion upon that question.

It follows from what we have said that our judgment is for the appellants.

Judgment for the appellants with costs. (1)

Solicitors for appellants: *Norton, Rose, Norton, & Brewer.*
Solicitors for respondents: *G. W. Marsden & Son.*

1878
Nov. 20.

[IN THE COURT OF APPEAL.]

BEYNON & CO. *v.* GODDEN & SON.
H. R. EVANS, THIRD PARTY.

Practice—Costs of Third Party—Power of Court to alter Direction previously given as to Costs.

The Court has no power to annul a direction in a judgment previously delivered, that a third party shall pay the costs of the interlocutory proceedings taken to bring him before the Court, although by the judgment in the action it is ordered that he be dismissed from the action with costs to be paid by the defendants.

APPLICATION, by way of original motion, to vary the judgment delivered in this Court on the 18th of May, 1878. (2)

The defendants had claimed that H. R. Evans should be made a third party to the action, and had taken out a summons before a master to effect that object; the master having refused to make an order, a judge at chambers granted the application. Upon appeal, the Exchequer Division overruled the decision of the judge, and upon appeal to this Court the decision of the Exchequer Division was overruled with costs. H. R. Evans was thus

(1) Leave to appeal was refused. (2) 3 Ex. D. 263.

made a third party to the action. It was tried before Huddleston, B., without a jury; he decided in favour of the defendants, but ordered them to pay the costs of Evans. The defendants appealed to this Court, but the Lords Justices held that Evans was not liable, and he was dismissed from the action. (1) Upon taxation of the costs, the master declined to allow H. R. Evans the costs of the interlocutory proceedings, whereby he was made a third party, as the master felt himself bound by the order that Evans should pay the costs thereof.

A. T. Lawrence, for Evans. A great hardship will be inflicted upon Evans if he is not allowed the costs of the interlocutory proceedings; for although it is established by the judgment of this Court, affirming the decision of Huddleston, B., that he ought not to have been made a party, he will be compelled to pay the costs of resisting the steps improperly taken to bring him before the Court. He ought to have all the costs, which he has incurred through being made a party to the action. It is submitted that the view taken by the master upon taxation was wrong, and that the judgment of Huddleston, B., affirmed as it was by this Court, gave to Evans the costs of the interlocutory proceedings; if, however, this contention cannot be sustained, the judgment of this Court delivered upon the 18th of May, ought to be varied so as to annul the direction given when Evans was made a third party, and to allow him the costs of the interlocutory proceedings; this may be done under the Rules of the Supreme Court, Order LVIII., rule 5, which enacts that "the Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just."

Pollard, for the defendants, was not called upon to argue.

BRAMWELL, L.J. I do not think that we can alter the specific direction of this Court as to the interlocutory proceedings. When application is made for leave to add a third party, the Court can only consider whether there is a plausible ground for granting it. In the present case a plausible ground existed for joining Evans as a third party, and he was wrong in resisting the steps taken by

(1) See 3 Ex. D. 266, 267.

1878

BRYNOR v. GODDEN.

the defendants. I do not think that we can alter the judgment of the Court delivered upon the 18th of May as to the main question in the cause. The application before us is to vary the judgment, and not to draw it up properly.

BRETT, L.J. Whatever order Huddleston, B., made as to the costs stands unimpeached by the judgment of this Court delivered upon the 18th of May, and if it is valid as to the costs of the interlocutory proceedings effect can be given to it. It seems to me that we have no power to alter the order, which we have already given as to the costs of the interlocutory proceedings; and I think that that order was right upon principle. Suppose that an application for leave to defend is made under the Summary Procedure of Bills of Exchange, 1855, and that leave to defend is granted, and upon appeal is allowed with costs, but that at the trial the plaintiff succeeds in obtaining judgment: can the defendant be then deprived of the costs granted to him by the interlocutory order? In my opinion he cannot.

COTTON, L.J. Under the former practice of the Court of Chancery upon an interlocutory proceeding the costs were not disposed of but were reserved, and the party who was successful upon the decree obtained them. I do not, however, dissent from the view of the other members of this Court.

Application dismissed.

Solicitors for defendants: *Cowdell, Grundy, & Browne.*
Solicitors for H. R. Evans: *Stocken & Jupp.*

[IN THE COURT OF APPEAL.]

1878
Nov. 20.

GALATTI *v.* WAKEFIELD AND ANOTHER.

Practice—Costs—Reference and Award—Reference by Consent—Costs of Award in discretion of Arbitrator—County Courts Act 1867 (30 & 31 *Vict. c.* 142), *s.* 5.

When an action is referred by consent to arbitration upon the terms that the costs of the cause shall abide the event, and the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiff he may lawfully direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause under the County Courts Act, 1867, s. 5.

Quære, whether *Moore* v. *Watson* (Law Rep. 2 C. P. 314) was correctly decided.

ACTION commenced in the Liverpool District Registry to recover commissions amounting to 80*l.* 6*s.* 1*d.* The defendants delivered a counter-claim for 42*l.* 3*s.* 7*d.* It was agreed between the parties that all matters in dispute should be referred to an arbitrator, and an order by consent was drawn up providing that "the costs of the said cause shall abide the event and determination of the said certificate or award, and that the costs of the said certificate or award shall be in the discretion of the said arbitrator, who shall award or certify by whom or to whom and in what manner the same shall be paid, and the same shall be taxed, allowed, or deducted by the district registrar, and shall be recovered, if necessary, in the same manner as if the same were costs in the cause." By his award the arbitrator directed the defendants to pay to the plaintiff the sum of 10*l.* 3*s.* 4*d.* in settlement of his claim of 80*l.* 6*s.* 1*d.*, and directed that as to the defendants' counter-claim they were entitled to nothing. He further directed the defendants to pay to the plaintiff the costs of and incidental to the reference and the costs of the award. No order was made by the arbitrator within the meaning of the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. Cleasby, B., ordered that the district registrar should tax and allow the costs of the plaintiff of the reference and award, and that the defendants should pay the same to the plaintiff. The defendants having appealed to the Exchequer Division, that Court dismissed the appeal: the defendants then appealed to this Court.

1878

GALATTI v. WAKEFIELD.

Henn Collins, for the defendants. As the plaintiff has recovered less than 20*l.* in an action of contract, and has not obtained a certificate under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5 (1), the defendants cannot be compelled to pay the costs of the reference and award, for these are a portion of the costs of the cause. In *Moore* v. *Watson* (2) it was held by the Court of Common Pleas that upon a compulsory reference in an action of contract the plaintiff cannot get the costs of the reference, if he does not recover more than 20*l.*; it is submitted that the principle of that case applies here. If the costs of the reference are part of the costs of the cause, the parties cannot contract themselves out of the operation of the County Courts Act, 1867, s. 5. The incidents of the tribunal are the same, whether it is created by the parties or by the compulsion of a superior power. The rule which ought to be followed is that upon a reference the plaintiff is deprived of costs, where he only recovers a sum which would have disentitled him to costs if the action had been tried: *Smith* v. *Edge* (3); *Cowell* v. *Amman Colliery Co.* (4) The plaintiff may rely upon *Forshaw* v. *De Wette* (5), but that case is inconsistent with the other authorities and ought to be overruled by this Court.

D. French, for the plaintiff, was not called upon to argue.

BRAMWELL, L.J. It is unnecessary to call upon the plaintiff's counsel to argue. It cannot be seriously disputed that the Court of Exchequer was right in the decision at which it arrived in *Forshaw* v. *De Wette*. (5) It is impossible not to hold that the parties to an action may contract themselves out of the statute.

(1) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5: "If in any action commenced after the passing of this Act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court, or a judge at chambers shall, by rule or order, allow such costs." The County Courts Act, 1867, s. 5, is incorporated by Supreme Court of Judicature Act, 1873, s. 67.

(2) Law Rep. 2 C. P. 314.

(3) 2 H. & C. 659; 33 L. J. (Ex.) 9.

(4) 6 B. & S. 333; 34 L. J. (Q.B.) 161.

(5) Law Rep. 6 Ex. 200.

It has been argued that there is no difference between a compulsory reference and a reference by consent, and that notwithstanding the discretion of the arbitrator as to the costs of the award they follow the event of the cause. In order to establish this proposition, reliance has been placed upon *Moore* v. *Watson* (1): it seems to me that that case is quite distinguishable from that before us; but I desire to add that, as at present advised, I do not agree with the decision; I, however, reserve my judgment, until the proper moment has come for determining whether it ought to be overruled. The decision was put upon the most technical ground; it was considered by the Court of Common Pleas that in a compulsory reference the costs of the award were part of the costs of the cause, because they were taxed upon the judgment. I feel great difficulty in agreeing with that argument; suppose that a cause is referred upon the terms that the costs of the action are to follow the event, but that the costs of the award are to be in the discretion of the arbitrator, and suppose that the plaintiff succeeds in the action, but that the arbitrator gives the costs of the reference to the defendant; how is the defendant to get his costs? I believe that upon taxation, as a matter of practice only, one allocatur is given; but I cannot see why there should not be two. Therefore, without either overruling or affirming the decision of the Common Pleas in *Moore* v. *Watson* (1), I am of opinion that the plaintiff is entitled to the costs of the reference, on the ground that the parties agreed that they should be in the discretion of the arbitrator, which he has exercised in favour of the plaintiff.

BRETT, L.J. In this case the question in dispute relates to the costs, not of the action but of the reference. The parties have agreed that the costs of the reference shall be in the discretion of the arbitrator. No Act of Parliament has been cited, which forbids that agreement from being carried into effect. *Moore* v. *Watson* (1) was a case of compulsory reference; I will say nothing now upon the question whether it was correctly decided.

COTTON, L.J. By the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5, the plaintiff is not to recover any costs, unless he

(1) Law Rep. 2 C. P. 314.

1878

GALATTI v. WAKEFIELD.

recovers more than 20*l.* in an action of contract; but this refers to the costs of the suit; here the parties have agreed that the costs of the reference shall be in the discretion of the arbitrator, and he has awarded them to the plaintiff. We were much pressed during the argument by the decision in *Moore* v. *Watson* (1); but that was a case as to compulsory reference, and it is unnecessary now to decide whether any distinction exists between a reference by consent and a compulsory reference.

Appeal dismissed.

Solicitor for plaintiff: *J. H. Lydall, for Stephens & Danger, Liverpool.*

Solicitors for defendants: *Shaw & Tremellen, for Powles, Liverpool.*

1879

May 19.

[IN THE COURT OF APPEAL.]

TOMLINE *v.* THE QUEEN.

Petition of Right—Petitions of Right Act, 1860 (23 & 24 *Vict. c.* 34), *s.* 7—*Practice—Procedure—Production of Documents—Rules of the Supreme Court, Order XXXI., rule* 12—*Application by Crown against Suppliant for Discovery.*

In a petition of right the Crown is entitled as against the suppliant to an order for the discovery of documents, by the combined effect of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, and the Rules of the Supreme Court, Order XXXI., rule 12.

PETITION of right, dated the 19th of August, 1878, and claiming payment of certain tolls under an agreement between the suppliant and the Crown to pay him 1*s.* a ton on certain kinds of goods, landed on and carried over a jetty built upon the suppliant's land adjoining the sea-shore. The Attorney General having pleaded on behalf of the Queen, the suppliant joined issue.

A summons at chambers was taken out by the Crown against the suppliant for the discovery and production of documents. A master made an order for discovery; the suppliant appealed to Field, J., who referred the matter to the High Court. The Exchequer Division (Kelly, C.B., and Pollock, B.), were of

(1) Law Rep. 2 C. P. 314.

opinion, upon the authority of *Thomas* v. *Reg.* (1), that the Crown was not entitled to discovery, and rescinded the order of the master.

The Crown appealed.

C. Bowen, for the Crown. The question is, whether in a petition of right the Crown is entitled to a discovery of documents as against the suppliant. That depends upon the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7 (2), which incorporates the laws and statutes in force as to pleading, practice, and procedure in suits between subject and subject, "so far as the same may be applicable." The words of the enactment are sufficiently wide to include not only existing but also future statutes as to practice and procedure.

[*Herschell, Q.C.*, for the suppliant, stated that he should not dispute that the practice and procedure introduced by the Supreme Court of Judicature Acts, 1873, 1875, extended in some respects to petitions of right.]

Then the only question is, whether discovery of documents is "applicable" to petitions of right. It is submitted that the Crown is entitled to it as against the suppliant; the right to it is not counterbalanced by any consideration of public policy or privilege. It has been decided by the Court of Queen's Bench in *Thomas* v. *Reg.* (1), that discovery cannot be obtained from the Crown; and the judges in the Exchequer Division were of opinion that the principle of that decision extended to cases where discovery is sought from a suppliant. It may be argued for the

(1) Law Rep. 10 Q. B. 44.

(2) By the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, "so far as the same may be applicable, and except so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error, in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case, in which he would not have been entitled to such remedy before the passing of this Act."

1879

TOMLINS v. THE QUEEN.

suppliant that as discovery if it were allowed in petitions of right would be one-sided only, it does not fall within the language of 23 & 24 Vict. c. 34, s. 7, which comprehends only those cases of practice and procedure, where a reciprocal advantage is bestowed on both the Crown and the suppliant; this argument is not maintainable; the suppliant ought to give discovery, although for technical reasons the Crown is not compellable to do so: those technical reasons are that the Queen is not specially named in the statute, that she is not such a corporation as can answer by officers, and that she herself cannot be compelled to answer on oath. The document, which a suppliant seeks to discover, may be such as by reason of public policy ought not to be set out in the schedule to an affidavit of documents. The Petitions of Right Act, 1860, has not interfered with the prerogative of the Crown in matters of pleading and procedure: *Tobin* v. *Reg.* (1): that case shews that what is applicable to a suppliant, is not necessarily applicable to the Crown; and the principle of that decision applies to this application for discovery, which is made under Rules of the Supreme Court, Order XXXI., rule 12. (2) The suppliant is not a party within the meaning of that rule.

[BRAMWELL, L.J. The Petitions of Right Act, 1860, s. 7, incorporates the practice as to security for costs: this can apply only against the suppliant; the Crown cannot be called upon to give security for costs.]

The relief, which can be obtained against the Crown, is not so extensive as that which can be obtained against a subject. *Thomas* v. *Reg.* (3) merely decided that discovery could not be had against the Queen, it did not decide that the practice introduced by the Common Law Procedure Act, 1854, was unavailable against a suppliant. If only those parts of the Rules of the Supreme Court are to be deemed to have been incorporated, which confer a complete reciprocity between the Crown and the suppliant, only a very small portion of the practice and procedure

(1) 14 C. B. (N.S.) 505; 32 L. J. (C.P.) 216.

(2) By Rules of the Supreme Court, Order XXXI., rule 12, "any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action."

(3) Law Rep. 10 Q. B. 44.

introduced by the Supreme Court of Judicature Acts, 1873, 1875, will apply to petitions of right.

English Harrison (*Herschell, Q.C.*, with him), for the suppliant. It is submitted that only those portions of the Supreme Court of Judicature Acts, 1873, 1875, are incorporated with the Petitions of Right Act, 1860, which confer a benefit on both the Crown and the suppliant; it has been decided in *Thomas* v. *Reg* (1) that the latter cannot have discovery, and therefore the Crown is not entitled to it. (2)

C. Bowen, did not reply.

BRAMWELL, L.J. I am of opinion that this appeal must be allowed. If it were not that the Exchequer Division came to a different conclusion from that at which we have arrived, I should have thought this a very plain case. Sect. 7, of the Petitions of Right Act, 1860, provides that the existing and future practice of the courts of law and equity as to procuring evidence in suits between subject and subject shall extend to petitions of right, subject to the qualification, "so far as the same may be applicable." I have not the least doubt that the practice as to discovery is "applicable" to petitions of right, when it is the Crown which seeks discovery from the suppliant. The case before us may be disposed of on this short ground. It is unnecessary to consider whether *Thomas* v. *Reg* (1) was correctly decided; but I will assume that technical reasons exist which prevent a suppliant from obtaining discovery: do these technical reasons make the practice

(1) Law Rep. 10 Q. B. 44.

(2) During the argument the counsel for the suppliant stated that the only reason for resisting the application for discovery was that the suppliant could not obtain discovery from the Crown; but that if the Court were of opinion that the decision in *Thomas* v. *Reg.* (Law. Rep. 10 Q. B. 44), was wrong, and that discovery could be obtained against either party to a petition of right, and if they on this ground overruled the decision of the Exchequer Division, the suppliant would not oppose the judgment against him. The counsel for the suppliant cited Bacon's Abridg. Corporations (A.): Grant on Corporations, pp. 626, 627, for the purpose of shewing that the Queen is, by the common law, such a corporation as may answer by the oath of its officers, that is, the ministers. The Lords Justices, however, held that the only question before them was whether the suppliant could be compelled to give discovery, and they declined to express any opinion whether *Thomas* v. *Reg.* (Law Rep. 10 Q. B. 44), was rightly decided, and whether the Crown was liable to give discovery.

1879

TOMLINE v. THE QUEEN.

as to "discovery" less applicable as against a suppliant? I think not: the practice is as much applicable as to him as to the plaintiff and the defendant in an ordinary action. I repeat that it is unnecessary to express any opinion as to *Thomas* v. *Reg.* (1); but I may remark that if technical difficulties do exist in the way of obtaining discovery from the Crown, possibly the legislature has intentionally left those difficulties in existence, in order that it may be in the discretion of the Crown whether it will afford the information sought for by a suppliant.

BAGGALLAY and THESIGER, L.JJ., concurred.

Appeal allowed.

Solicitor for suppliant: *Walter F. Stokes.*

Solicitor for Crown: *W. Tindal Perkins, for the Solicitor for the Treasury.*

May 19.

[IN THE COURT OF APPEAL.]

HUNTER *v.* YOUNG AND WIFE.

Executor—Residuary Legatee—Action by Creditor of Testator—Non-joinder of Executor as Defendant—Practice—Rules of the Supreme Court, Order XVI., Rule 17.

In an action against Y. and A., his wife, the claim alleged that W. owed the plaintiff 40*l.*, and that at his death he appointed by his will M. W. his residuary legatee; that M. W. died, having by her will appointed A., the female defendant, her residuary legatee; that the residuary estate of W. had been assigned by his surviving executor to the defendants. The plaintiff claimed payment of £40 from the defendants, but the surviving executor of W. was not made a party to the action:—

Held, upon demurrer, that the claim disclosed a good cause of action; for even if the practice of the Court of Chancery would have required the surviving executor of W. to be joined as a defendant, the proper course (since the passing of the Judicature Acts, 1873, 1875) for the defendants to take, if they wished to bring him before the Court, was to make him a party to the action under Rules of the Supreme Court, Order XVI., Rule 17.

Clegg v. *Rowland* (Law Rep. 3 Eq. 368) commented upon and approved of.

WRIT issued 15th of March, 1878.

CLAIM:—

1. The plaintiff is the widow of Samuel Hunter, who died on

(1) Law Rep. 10 Q. B. 44.

1879.

HUNTER v. YOUNG.

the 15th of September, 1867, having by his last will appointed the plaintiff his sole executrix. The said will was duly proved by the plaintiff in the district registry at Salisbury, on the 13th of June, 1868.

2. In the year 1869, Samuel Witley, a solicitor of Devizes, received on behalf of the estate of the said Samuel Hunter moneys amounting to 227*l.* 15*s.* 7*d.*

3. On the 27th of February, 1873, the said Samuel Witley died, having then in hand a balance of 40*l.* 14*s.* 1*d.* of the said moneys due to the plaintiff, and having by his will made his widow, Mary Charlotte Witley, his residuary legatee. The said will was duly proved by the executors in the district registry at Salisbury, on the 21st of March, 1873.

4. On the 4th of March, 1877, the said Mary Charlotte Witley died, having by her will made the defendant Annie Maria Young (the wife of the defendant Frederick Young) her residuary legatee. Letters of administration, with the will annexed, were duly granted to Annie Maria Young, on the 26th of April, 1877.

5. On the 21st of December, 1877, a portion of the residuary estate of Samuel Witley to the amount of 250*l.* was paid by his surviving executor to the defendants or one of them, and the remainder of such estate, which was of considerable value, was assigned by the said executor to the defendants or one of them by deed dated the 21st of December, 1877.

6. The plaintiff requires payment by the defendants, or either of them, of the sum of 40*l.* 14*s.* 1*d.*, due to her out of the estate of the said Samuel Witley.

The surviving executor of Samuel Witley was not made a party to the action.

Demurrer on the ground that the defendants were not the representatives of Samuel Witley.

Upon the argument of the demurrer in the Exchequer Division, Cleasby, B., gave judgment for the defendants, upon the ground that the action ought to have been brought against the surviving executor of Samuel Witley, who was liable to discharge the plaintiff's claim against the estate of his testator.

The plaintiff appealed.

1879

HUNTER v. YOUNG.

May 12. *A. Charles, Q.C.*, and *Thomas Latham*, for the plaintiff. It may be admitted for the plaintiff that before the Supreme Court of Judicature Acts, 1873, 1875, she could not have recovered from the defendants the amount due to her by action at law; but now, since every division of the High Court is bound to take notice of equitable rights, an action brought in the present shape is the proper mode of enforcing the plaintiff's claim against the estate of S. Witley. Although the debt owing to the plaintiff does not constitute a fund which can be ear-marked in the defendants' hands, yet she is entitled to payment by those who are in possession of Witley's assets: *March* v. *Russell* (1); a creditor of a testator can compel a legatee to refund: 2 Williams on Executors, part iii. book iii. ch. iv. s. x. p. 1457 (8th ed.) The right to follow the assets is preserved by 22 & 23 Vict. c. 35, s. 29 (2), and nothing is to be found in that statute which interferes with the plaintiff's right to sue. The creditor of a testator may obtain payment of his debt out of a legacy which has been sold to a purchaser without notice of the debt, if the latter has not actually received the amount of the legacy: *Noble* v. *Brett*. (3) The counsel for the defendants may contend that the claim is bad, because the surviving executor of Witley has not been made a defendant in the action; but under the former practice in equity

(1) 3 My. & Cr. 31, at p. 40, per Lord Cottenham, L.C.

(2) By s. 29 of 22 & 23 Vict. c. 35 (commonly called Lord St. Leonards' Act), "Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively."

(3) 24 Beav. 499; 27 L. J. (Ch.) 516.

legatees might in some cases be sued without making the executor a party to the suit; as, for instance, where the estate had been administered under the direction of the Court, and a creditor sued for a subsequently accruing debt: *Thomas* v. *Griffith.* (1) A fund, which had been transmitted from a British colony, might be distributed by the Court of Chancery pursuant to the directions contained in a will proved in the colony without making the executor a party to the proceedings: *Arthur* v. *Hughes.* (2) An executor who has distributed the estate after giving the notices directed by 22 & 23 Vict. c. 35, s. 29, cannot be afterwards held liable by any creditors of the testator: *Clegg* v. *Rowland.* (3)

[BAGGALLAY, L.J. Primâ facie the executor is liable, and unless he has been freed from liability a legatee cannot be sued alone. Can any case be found where a legatee has been sued without making the executor a defendant, besides those cases, where an estate has been administered by the direction and under a decree of the Court, or where notices have been given pursuant to 22 & 23 Vict. c. 35, s. 29?]

No; but the principle of *Clegg* v. *Rowland* (3) ought to be extended to all cases, where an executor has innocently parted with the assets. At all events the claim is not demurrable; the remedy for the defendants to take is to make the surviving executor of S. Witley a third party to the action under Rules of the Supreme Court, Order XVI., rule 17. If the executor is wrongfully made a defendant by the plaintiff, she may have to pay his costs.

Petheram, for the defendants. The action in its present shape is misconceived; the surviving executor of S. Witley is the person primarily liable, and he ought to have been joined as a defendant. Legatees are liable only to refund to executors, and not to creditors.

[THESIGER, L.J. To say the least, that argument seems inconsistent with the reasoning in *Clegg* v. *Rowland.* (3)]

The defendants may be liable to refund for the benefit of Witley's estate generally; but he may have left other creditors, and the plaintiff ought not to enjoy a priority over them. No

(1) 2 Giff. 504; on appeal 2 D. F. & J. 555; 30 L. J. (Ch.) 465.

(2) 4 Beav. 506.

(3) Law Rep. 3 Eq. 368.

1879

HUNTER v. YOUNG.

debt is due from the defendants to the plaintiff; if they are held liable in this action, it is difficult to say where the responsibility of legatees will stop.

[THESIGER, L.J. The plaintiff is not claiming payment of a debt due from the defendants; she is simply following the assets of S. Witley; when they are exhausted, the liability of the defendants will cease.]

A. Charles, Q.C., in reply. To the extent of the assets which they have received, the defendants represent S. Witley, and are bound to pay the debts owing by him. As to the argument that S. Witley may have left other creditors, it may be replied that this is an action brought by the plaintiff on her own behalf to recover payment of a debt due to her, and there is nothing in law to prevent a creditor, who uses greater expedition, from obtaining payment of his debt in priority to other claims.

Cur. adv. vult.

May 19. The following judgments were delivered:—

BRAMWELL, L.J. I was aware that under the practice of the Court of Chancery legatees might in some cases be compelled to refund the amounts bequeathed to them, after payment by the executor; nevertheless I was struck with the novelty, as it seemed to me, of the present claim. I do not wish to express a confident opinion, but the conclusion at which I have arrived is that this appeal must be allowed. The claim alleges that a sum of money was due from S. Witley to the plaintiff, and that the female defendant is the administratrix and residuary legatee of his residuary legatee, and that the residue of his estate has been assigned by his surviving executor to the defendants; therefore they are in the same position as if they had been his residuary legatees. The claim in effect avers that the debts due by S. Witley, and the legacies bequeathed by him, have been paid, and that his remaining assets have been handed over to the defendants; and the question is whether an action is maintainable by the plaintiff without joining S. Witley's surviving executor as defendant. I speak with reserve as to the former practice of the Court of Chancery; but after consulting Baggallay, L.J., and other eminent persons acquainted with equity, I find that it was considered

1879

HUNTER v. YOUNG.

very doubtful whether a suit by a creditor could be maintained against the residuary legatees of his debtor without joining the executor as a defendant. It was established that residuary legatees who had received their legacies might be sued by an unpaid creditor of their testator and compelled to refund the amounts paid to them: upon this point I need only refer to Seton on Decrees, vol. ii. part 4, ch. 23, s. 30, pp. 976 and 977 (4th ed.), and the cases *Hall* v. *Palmer* (1) and *Fordham* v. *Wallis* (2), therein referred to. As the residuary legatees might be sued, it would seem to be unreasonable that in order to obtain payment of his debt a creditor of the testator should be compelled against his will to make the executor a party to the suit: suppose that the executor was dead, intestate and insolvent, would the creditor be bound to get some person appointed administrator de bonis non before he could sue the residuary legatee? I think not. Equity jurisprudence has grown up out of the practice of the Courts, and one might expect to find that in some cases a residuary legatee might be sued without joining the executor as a defendant. I own that I feel doubts in the present case; the executor, if joined, might allege that other debts of the testator had been discovered, and might claim to have the estate restored to him. I think, however, that as to this consideration, it is sufficient to repeat that the claim, which by the demurrer is admitted to be true, in effect avers that all the debts have been paid. I will now refer to 22 & 23 Vict. c. 35, s. 29: the proviso at the end of this enactment preserves the right of any creditor or claimant to follow the assets of a testator, but it enacts that the executor shall not be liable for the assets: it may be argued that, although the executor is not to be liable, he must nevertheless be made party to a suit against the legatees; I cannot assent to an argument of that kind; for if an executor is not liable to pay, he ought not to be sued; the legislature cannot have intended that the executor should be joined when no remedy can be had against him; the enactment must mean that the suit shall be maintainable against the legatees without joining the executor. I wish to refer in support of my view to *Clegg* v. *Rowland* (3), where Malins, V.C.,

(1) 3 Hare, 532. (2) 10 Hare, 217.
(3) Law Rep. 3 Eq. 368.

'1879

HUNTER v. YOUNG.

held that executors who had distributed the assets of their testator after taking the steps pointed out by 22 & 23 Vict. c. 35, s. 29, would have the same protection as if they had administered the estate under a decree of the Court, and were not liable to make good sums improperly received by their testator in his lifetime. So far as it goes, this case is a strong authority in favour of the plaintiff. I should therefore have given judgment for the plaintiff, on the ground that in the Court of Chancery the plaintiff might have sued the defendants without joining the surviving executor of S. Witley; but even if before the Supreme Court of Judicature Acts, 1873, 1875, equity would have required the executor to be joined, I think that the rule of practice has been done away with, and that if the defendants wished to bring the surviving executor of Witley before the Court, they ought instead of demurring to have joined the surviving executor as a third party under the Rules of the Supreme Court, Order XVI., rule 17. It will probably turn out that the executor has no interest in this action, and it does seem to me much better to allow the parties, who are really concerned in the result, to fight out the question in dispute without bringing into Court an uninterested person. The demurrer must be overruled, and the appeal must be allowed. If the action had been brought to recover a large amount, it would have been well to take the opinion of the House of Lords whether our decision is correct.

BAGGALLAY, L.J. I have felt, and do still feel, great doubt as to what our decision in this case ought to be. Under the old practice in equity when a creditor took proceedings against the estate of his deceased debtor, it was essential to have before the Court the personal representative, and the legatee might be made a party to the suit in order to enable the creditor to follow the assets. Upon this general rule an exception had been engrafted, where a decree had been made for the administration of the estate and the assets had been dealt with and distributed under the direction of the Court. In a case of this kind the personal representative was not liable to be subsequently sued by a creditor whose debt had not been satisfied. Another exception has been added by Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 29, which

provides that when an executor has given notices similar to those used in administration suits, he shall be at liberty to distribute the testator's assets amongst the parties entitled thereto; the notices discharge the executor from liability, and he is in the same position as if the estate had been administered under the direction of the Court of Chancery. In order, however, to protect him it is essential that he should have no notice of any claim which, at the time of the distribution of the assets, is left unsatisfied. The claim in the present action does not allege that the notices required by 22 & 23 Vict. c. 35, s. 29, have been given, and that at the time of distributing the assets the surviving executor of Witley had no notice of the plaintiff's claim. (1) As the plaintiff does not allege that the directions of that statute have been complied with, I should have felt inclined to adopt the view of Cleasby, B., and to allow the demurrer. I do not, however, dissent from the judgment of the other members of this Court. Certainly, the view of my colleagues lays down a convenient rule of practice. If the notices directed by 22 & 23 Vict. c. 35, s. 29, had been given, and the executor had received no notice of the plaintiff's claim, the case would have fallen within the authority of *Clegg* v. *Rowland* (2), and the action would have been clearly maintainable. I repeat that I feel doubts; but upon the whole I concur in holding that the demurrer must be overruled.

THESIGER, L.J. The principle upon which the action is founded is, that where an executor has administered assets and paid over the residue of an estate, a creditor of the testator is entitled to follow the residue to the extent of his debt. The fund is the point to which the action is directed, and the person in whose hands the fund is would, as it appears to me, be naturally the

(1) It was understood by the reporter that notices were issued pursuant to 22 & 23 Vict. c. 35, s. 29, to the creditors of S. Witley after his death to send in their claims, and that the plaintiff thereupon gave notice to his executor of the debt due to her; and that her demand not being then paid, it was overlooked when the assets of Witley were assigned to the defendants. The plaintiff therefore could not with truth aver in the claim that the requirements of the statute had been complied with by Witley's executor.

(2) Law Rep. 3 Eq. 368.

1879

HUNTER v. YOUNG.

party against whom the action would be brought. The executor, if he has protected himself in the way pointed out by Lord St. Leonards' Act, is, according to the decision of Malins, V.C., in *Clegg* v. *Rowland* (1), quâ executor, not a proper party at all; but if, in such a case, he might be made a party, and even in cases where the executor has not protected himself under Lord St. Leonards' Act, I cannot think that the plaintiff's statement of claim is demurrable, because she has not made him a party. If there are rights arising out of the action to be adjusted between the executor and the residuary legatee, the latter may bring him into the action by the machinery provided by rule 17 of Order XVI. of the rules under the Judicature Acts.

It seems unreasonable that the plaintiff in cases like the present should be bound to make the executor a party, when the plaintiff's case is that she has no ground of claim against the executor, and might have to pay his costs if she did join him as a defendant.

Appeal allowed.

Solicitors for plaintiff: *Wood, Latham, & Bigg, for Day & Marshall, Devizes.*

Solicitors for defendants: *Courtenay & Croome, for Beale & Martin, Reading.*

(1) Law Rep. 3 Eq. 368.

[IN THE COURT OF APPEAL.]

1879
May 27.

DAVIES *v.* McVEAGH.

Ship—Charterparty—Arrival of Ship at Place of Loading—Demurrage.

By a charterparty it was agreed that the plaintiff should at L. load on the defendant's vessel, the *P.*, a cargo of coal, and that she should proceed therewith to D., "the vessel to be loaded and discharged in nineteen running days, or if longer detained, to pay 4*l.* per day demurrage." At the foot of the charterparty was a memorandum, "Vessel to load in B. M. Dock or W. Dock, high level." On the day following the execution of the charterparty, the *P.* was, as a matter of favour, admitted into the W. Dock, and was then ready to receive her cargo, but owing to the regulations of the dock authorities she did not begin to load until about a fortnight later. Upon her arrival at D. disputes arose between her captain and the plaintiff as to the form of the bill of lading, and in consequence thereof her cargo was not unloaded until twenty days had elapsed after the expiration of the nineteen running days, if calculated from the time of her admission into the W. Dock. In order to obtain delivery of the cargo, the plaintiff was obliged to pay 80*l.* claimed as demurrage in respect of the twenty days, which he now sued to recover back:—

Held, that the nineteen running days were to be calculated from the time when the *P.* was admitted into the W. Dock, that the plaintiff was liable for demurrage, and that the action would not lie.

ACTION to recover back the sum of 80*l.* paid by the plaintiff under protest, and also damages for delay in delivering a cargo of coal shipped on board the defendant's vessel, the *Pleiades*.

At the trial before Brett, L.J., at Liverpool Spring Assizes, 1878, the following facts were proved:—

The plaintiff was a coal merchant carrying on business in Runcorn, and the defendant was owner of the schooner *Pleiades*. The following charterparty was entered into between the plaintiff and the defendant:—

"Liverpool, 19th November, 1877.

"I hereby engage with Joseph Davies, Esq., to receive and load on board my vessel, the *Pleiades*, of Belfast, being tight, staunch, and strong, and every way fitted for the voyage, a full and complete cargo of coal, about 375 tons to 390 tons, and proceed to Dublin, Burgh Quay, or so near thereunto as she may safely get, and deliver the same, per bills of lading, on being paid freight at the rate of 6*s.* per ton of 20 cwt., and three guineas gratuity.

1879

DAVIES v. MCVEAGH.

The vessel to be loaded and discharged in nineteen running days, or if longer detained, to be paid 4*l.* per day demurrage, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage, always excepted). Ship to have a lien on the cargo for all freight, dead freight, and demurrage.

"Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) "Thomas McVeagh."

"I hereby engage to load said vessel on the above terms. Vessel to load in B. Moore or Wellington Dock, High Level.

(Signed) "Joseph Davies.

"Nov. 19, 1877."

Bramley Moore Dock and Wellington Dock were adjacent docks at Liverpool, and were approached through Wellington half-tide Basin. At the end of Wellington Dock was a high level railway and platform, with convenient tips for loading coal.

On the 19th of November the *Pleiades* finished unloading her inward cargo in the Wellington half-tide Basin, and was ready to ship coals for the plaintiff so soon as she could get a berth. On the 20th she was admitted into the Wellington Dock as a matter of favour, because, being empty, she was in danger outside; but in consequence of the regulations of the dock authorities, who had control over all vessels in the docks, she was unable to obtain a berth at the high level till the 5th of December. She then began to load, and finished loading on the 6th. The captain refused to sign any bill of lading, except one containing the words, "Sixteen days have been consumed in loading the said vessel in Liverpool, leaving three running days for discharging at Dublin." This bill of lading the plaintiff refused to take. The *Pleiades* sailed from Liverpool, and arrived at Dublin on the 23rd of December. The captain would not deliver the cargo except on the production of a bill of lading in the form above mentioned, and the vessel remained unloaded for some time. Ultimately, in order to obtain delivery of the cargo, the plaintiff was obliged to accept a bill of lading in the form above mentioned,

and to pay under protest the sum of 80*l.*, being the demurrage claimed by the captain for twenty days' detention. The plaintiff now sued to recover this sum of 80*l.*, and also damages sustained by delay in delivering the cargo. 1879. DAVIES v. MCVEAGH.

Upon these facts, which were not disputed, Brett, L.J., gave judgment for the defendant.

The plaintiff appealed.

May 26, 27. *Gully, Q.C.* (*J. C. Mathew*, with him), for the plaintiff. The running days did not commence until the *Pleiades* had obtained a loading berth; and she did not obtain it before the 5th of December. The defendant's counsel may contend that the running days commenced upon the 20th of November, when the ship had discharged her inward cargo; this contention, however, is at variance with *Tapscott* v. *Balfour* (1), where upon facts similar to those now before this Court, it was held that the lay-days commenced from the time of the vessel entering the dock. It is true that in the present case the *Pleiades* was admitted into the Wellington Dock upon the 20th of November; but her admission was granted only as a matter of favour, in order that she might get to a place of shelter, and it does not appear that her captain could have claimed as matter of right to take her inside the dock until she began to load; therefore nothing in *Brown* v. *Johnson* (2), or *Tapscott* v. *Balfour* (1), is adverse to the plaintiff's contention. These cases are not impeached by the decision in *Ashcroft* v. *Crow Orchard Colliery Co.* (3), where the words of the charterparty were, "To be loaded with the usual despatch of the port."

C. Russell, Q.C., and *D. French*, for the defendant. In *Tapscott* v. *Balfour* (1), no fixed number of days was allowed for loading the plaintiff's vessel; in the present case, a period of nineteen running days was fixed as the time within which the *Pleiades* was to be loaded and discharged, and the principle must be applied similar to that which was laid down in *Thiis* v. *Byers* (4), namely, that "where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the

(1) Law Rep. 8 C. P. 46.
(2) 10 M. & W. 331.
(3) Law Rep. 9 Q. B. 540.
(4) 1 Q. B. D. 244, at p. 249.

1879

DAVIES v. McVEAGH.

time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days." The defendant, as shipowner, had done all that he was bound to do by the charterparty, when the *Pleiades* was ready to ship the cargo for the plaintiff and had entered the Wellington Dock. It is for the charterer to bear the loss occasioned by the regulations of the dock authorities: *Ashcroft* v. *Crow Orchard Colliery Co.* (1), which comments upon and explains *Kearon* v. *Pearson.* (2) Of the earlier cases, *Randall* v. *Lynch* (3), and *Brown* v. *Johnson* (4), so far as they go, are in favour of the contention for the defendant; perhaps *Kell* v. *Anderson* (5) may support the argument for the plaintiff; but it does not outweigh the authorities which have been cited upon the defendant's behalf.

Gully, Q.C., in reply.

BRAMWELL, L.J. This appeal must be dismissed. When a ship is to take on board cargo at a specified place of loading, the responsibility rests not with her owner but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time. In the present case, the ship was at her place of loading, when she was admitted into the Wellington Dock. Definitions are always dangerous, and I am not anxious to state one, which hereafter may be questioned; but I think it may be laid down that a vessel has reached the place of loading, as distinguished from the spot of loading, when she has entered that port from which her voyage is to commence. I am not afraid of the consequences, even if this definition is pushed to a great extent: suppose that the defendant's vessel had been lying in the river Mersey, and that her captain had given notice to the plaintiff that he was ready to enter the dock, and ready to take on board the cargo: I do not think it would have been open to the plaintiff as charterer, to contend that the vessel was not at the place of loading, that she was not in a proper position, and that the nineteen days did not begin to run. If the

(1) Law Rep. 9 Q. B. 540.
(2) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(3) 2 Camp. 352.
(4) 10 M. & W. 331.
(5) 10 M. & W. 498.

defendant's vessel had got into the dock and had afterwards been turned out by the authorities, so far as concerns the defence in this action, she would have been in as good a position for loading as if she had remained inside the dock. It has been argued that if we determine in favour of the defendant, we shall be going counter to the reasoning in *Tapscott* v. *Balfour*. (1) I do not propose to discuss the authorities at length; but I may say that if *Tapscott* v. *Balfour* (1) is at variance with our decision, it is also opposed to *Ashcroft* v. *Crow Orchard Colliery Co.* (2)

BAGGALLAY, L.J. I am of the same opinion; it is very plain to me that this appeal must be dismissed. The running days began at the latest at the time when the *Pleiades* was cleared, and was lying in the Wellington Dock.

THESIGER, L.J. I am of the same opinion. By inserting the clause as to the nineteen running days a definite time is stated for loading and discharging the cargo. I do not think it of much consequence whether the time is definite or indefinite; nevertheless, the circumstance, that the time for loading and unloading was not strictly defined, seems to have had some weight with the Court of Common Pleas in leading them to the decision in *Tapscott* v. *Balfour* (3); but in *Ashcroft* v. *Crow Orchard Colliery Co.* (2), the language of the charter was indefinite, and yet it was held that the charterers were liable for delay in loading the vessel owing to the pressure of business in the docks. In the present case the *Pleiades* was ready to receive her cargo on the 19th or at least the 20th of November; but several days elapsed before the plaintiff was able to put it on board; for that delay he is in law responsible; and as against him, the running days commenced from the 20th of November.

BRAMWELL, L.J. I wish to add, that my view is justified by *Randall* v. *Lynch* (4), and *Brown* v. *Johnson*. (5) Allusion has been made to *Kell* v. *Anderson* (6); but that case is to be explained by the circumstance that at the time of the alleged

(1) Law Rep. 8 C. P. 46.
(2) Law Rep. 9 Q. B. 540.
(3) Law Rep. 8 C. P. 46, at p. 53.
(4) 2 Camp. 352.
(5) 10 M. & W. 331.
(6) 10 M. & W. 498.

1879

DAVIES v. MCVEAGH.

detention, the vessel had not in point of law completed her voyage.

Judgment affirmed.

Solicitor for plaintiff: *H. G. Field, for Etty, Liverpool.*

Solicitors for defendant: *Crowder, Vizard, & Anstie, for J. M. Quiggin, Liverpool.*

July 4.

WALE, APPELLANT; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 109, *and Schedule tit. Mortgage—Transfer or Assignment of Mortgage.*

By an indenture in 1877—after reciting that by a mortgage in 1872, W. the mortgagor had conveyed certain hereditaments to secure 350*l.* lent to him by the mortgagees with a proviso for redemption on payment of the 350*l.*—it was witnessed that in consideration of 350*l.* paid by S. to the mortgagees at W.'s request in satisfaction of all moneys owing upon the recited mortgage (the receipt of which 350*l.* the mortgagees acknowledged, and therefrom released S. and W.), and also in consideration of 120*l.* paid by S. to W. the mortgagees conveyed and released, and W. released and confirmed to S. in fee, the hereditaments discharged from the said proviso for redemption; with a proviso for redemption on payment by W. to S. of the two sums of 350*l.* and 120*l.*, making together the sum of 470*l.*, and a covenant by W. for payment thereof to S.:—

Held, that though there was no formal assignment of the old debt of 350*l.* and though that debt and the old equity of redemption were extinguished, the indenture of 1877 was as to the 350*l.* in substance a "transfer of a mortgage" within the meaning of the schedule to the Stamp Act, 1870, and was therefore liable to be stamped as a transfer, with a further ad valorem duty on the fresh advance of 120*l.*, and was not liable to be stamped as a "mortgage" for 470*l.*

CASE stated by the Commissioners of Inland Revenue, pursuant to the 19th section of the Stamp Act, 1870.

1. A full copy of the instrument in question was annexed, and was to be taken as part of the case.

2. The instrument being then stamped with the duty of 6*s.* was on the 28th of December, 1877, presented on behalf of Wale to the Commissioners of Inland Revenue under the provision of the 18th section of the Stamp Act, 1870, for their opinion as to the stamp duty with which it was chargeable.

3. The commissioners being of opinion that the instrument was chargeable under the provisions of the Stamp Act, 1870, as a mortgage for 470*l.* with the ad valorem duty of 12*s.* 6*d.* assessed

the duty thereon accordingly, and the instrument has been stamped, and the duty paid thereon in conformity with the assessment.

4. Wale being dissatisfied with the assessment, required the commissioners to state and sign a case to enable him to appeal against the same.

5. Wale contended that the instrument was, as to the sum of 350*l.* (part of the said sum of 470*l.*) a transfer, assignment, disposition or assignation of a mortgage within the meaning of the Act, and was, in respect of the sum of 350*l.*, chargeable with stamp duty at the rate of 6*d.* and no more for every 100*l.* and for any fractional part of 100*l.* of the said 350*l.*—that is to say—with the duty of 2*s.* and no more, and that the instrument was to the extent only of the sum of 120*l.*, the remainder of the said sum of 470*l.*, chargeable with duty as a mortgage or principal security for a sum exceeding 100*l.* and not exceeding 150*l.*—that is to say—with the duty of 3*s.* 9*d.* and no more, making together with the duty of 2*s.* the total duty of 5*s.* 9*d.* and no more. The mortgage for 350*l.*, which is recited in the instrument, has been produced to the commissioners and is stamped with the duty of 10*s.*

The question to be decided by the Court was: With what amount of stamp duty the instrument was chargeable.

The material parts of the indenture in question were as follows:—

It was made on the 15th of November, 1877, between Fox of the first part, S. Ingram, widow, of the second part, Wale (the appellant) of the third part, and C. Sutton of the fourth part, and after reciting—

That by an indenture dated the 15th of July, 1872, and made between the said Wale of the first part, the said S. Ingram of the second part, and the said Fox of the third part, in consideration of 350*l.* paid by S. Ingram to Wale, and also for a nominal consideration paid by Fox to Wale, Wale at the request of S. Ingram granted, released, and conveyed to Fox, his heirs and assigns, certain hereditaments to hold to the use of Fox, his heirs and assigns for ever, subject to certain annuities and the powers for the recovery thereof:

And that by the said indenture it was declared that if Wale,

1879

WALE v. COMMISSIONERS OF INLAND REVENUE.

his heirs, executors, administrators, or assigns, should pay to S. Ingram, her executors, administrators, or assigns, the sum of 350*l.*, together with interest for the same after the rate at the time and in the manner therein mentioned, Fox, his heirs or assigns, would, upon the request of Wale, his heirs or assigns, reconvey the said hereditaments thereby granted to the use of Wale, his heirs or assigns, or to such other persons as he or they should appoint: and that by the said indenture there were powers of sale and other powers which had never been exercised: and that the said principal sum of 350*l.* still remained due to S. Ingram upon the above in part recited indenture of mortgage, but that all interest for the same had been paid, and that S. Ingram having required payment of the said sum of 350*l.*, Wale had applied to Sutton to lend him the sum of 470*l.*, to enable him to pay off the same, and to supply his other occasions which she had consented to do upon having the repayment thereof with interest secured in manner thereinafter expressed:

It was witnessed, That in consideration of the sum of 350*l.* paid by Sutton to S. Ingram at or before the execution of these presents, at the request of Wale, being in full satisfaction and discharge of all moneys owing upon the said above in part recited indenture of mortgage, the receipt of which 350*l.* S. Ingram acknowledged, and therefrom released and discharged Sutton, her heirs, &c., and also Wale, his heirs, &c.: And also in consideration of 120*l.* at the same time paid by Sutton to Wale, the payment and receipt of which several sums of 350*l.* and 120*l.*, making together 470*l.* Wale acknowledged, and therefrom released and discharged Sutton, her heirs, &c.:

Fox, at the request of S. Ingram and Wale, granted, released, and conveyed, and S. Ingram remised and released, and Wale granted, released, conveyed, and confirmed to Sutton and her heirs the said hereditaments, and all the estate, right, title, interest, claim, and demand whatsoever, both at law or in equity of Fox, S. Ingram, and Wale, respectively, to hold to the use of Sutton, her heirs and assigns for ever, freed and absolutely discharged from the said proviso for redemption thereof contained in the thereinbefore part recited indenture of mortgage, and all equity thereupon, and the trusts or powers for sale in the said

indenture contained, but subject and without prejudice to the said annuities, and to the powers for recovery thereof:

Provided always, and it was thereby declared that if Wale, his heirs, &c., should pay to Sutton, her executors, &c., the sum of 470*l.*, with interest at the rate of 5*l.* per cent., on the 15th of May next, then at any time thereafter, Sutton, her heirs and assigns, should at the request and costs of Wale, his heirs, &c., reconvey the said hereditaments to the use of Wale, his heirs and assigns, or as he or they should direct, free from all incumbrances created by Sutton, her heirs, &c. And Wale covenanted with Sutton that he, his heirs, &c., would pay to Sutton, her executors, &c., the said sum of 470*l.* with interest after the rate aforesaid, at the time and in manner thereinbefore appointed:

Provided always that if default should be made in payment of the said sum of 470*l.* and interest, or any part, Sutton, her executors, &c., might sell and convey the said hereditaments, and apply the moneys arising therefrom in payment first of the expenses, and next of the moneys owing upon the security, and pay the surplus, if any, to Wale, his heirs, &c.

The indenture in question also contained covenants by Wale for title, quiet enjoyment, and further assurance, and for insurance against fire; and covenants by Fox and S. Ingram against incumbrances by them respectively.

June 26, July 4. *A. Wills, Q.C.* (*S. Dickinson*, with him), for the appellant, contended that the instrument was a transfer or assignment within the meaning of the schedule to the Stamp Act, 1870, tit. Mortgage (1), and therefore liable to an ad valorem duty

(1) The Stamp Act, 1870 (33 & 34 Vict. c. 97), by s. 3 imposes "upon the several instruments specified in the schedule to this Act the several duties in the said schedule specified, and no other duties."

Sects. 105–115 are headed "As to Mortgages, &c."

Sect. 105: "The term 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be. . . . ."

Sect. 109: "No transfer of a duly stamped security, and no security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is to be charged with any

1879

WALE v. COMMISSIONERS OF INLAND REVENUE.

of 2*s.* on the 370*l.* transferred, and to a further ad valorem duty of 3*s.* 9*d.* on the fresh loan of 120*l.* and to no more.

Sir H. S. Giffard, S.G., Q.C. (*Dicey*, with him), for the commissioners. The instrument in question is a fresh mortgage for 470*l.* True, 350*l.* part thereof is to pay off the old mortgagee, but still the mortgagor borrows it from the new mortgagee. There is no assignment of the old debt of 350*l.*, and it is extinguished. In Bythewood and Jarman's Conveyancing Precedents, vol. vi. p. 337, 3rd ed. by Sweet, 1840, a form is given of a transfer of mortgage of leaseholds, from which (mutatis mutandis) the present deed seems to have been drawn; and in note (*a*) it is said: "Though the precedent is classed with transfers of mortgages in conformity to popular phrase (that term being commonly applied to all transactions in which the money advanced by the new mortgagee is applied in liquidation of a subsisting mortgage debt), yet it is more properly speaking a new mortgage. The derivative term indeed which is vested in the new lender is drawn out of the old mortgagee's estate, but this

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duty by reason of containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security."

Schedule: "Mortgage, bond, debenture, covenant, warrant of attorney, to confess and enter up judgment and foreign security of any kind:

(1.) Being the only, or principal, or primary security for—

The payment or repayment of money not exceeding 25*l.* . . . 8*d.*

. . . . . .

. . . . . .

Exceeding 100*l.* and not exceeding 150*l.* . . . . . 3*s.* 9*d.*

. . . . . .

Exceeding 300*l.*

For every 100*l.*, and also for any fractional part of 100*l.* of such amount . . . . . 2*s.* 6*d.*

. . . . . .

(3.) Transfer, assignment, disposition or assignation of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:

For every 100*l.*, and also for any fractional part of 100*l.* of the amount transferred, assigned, or disponed . . . . . 6*d.*

And also where any further money is added to the money already secured:

The same duty as a principal security for such further money."

seems to make no substantial distinction. The material fact is that the estate is *subject to a new proviso for redemption* which in effect constitutes it a new mortgage. It will be proper, therefore, to stamp the deed as a mortgage, even if it be thought probable, as suggested in another place, that an instrument of this kind would be considered as a transfer of mortgage within the meaning of the Stamp Act, since a difference of opinion exists upon the point. (Vide, ante, vol. v. p. 537.) Where the parties are anxious to avoid the stamp, the mortgage should be transferred subject to the existing equity of redemption, and a covenant by the mortgagor added to pay the debt; of which an example will be given in the next precedent. By leaving the equity of redemption undisturbed, instead of limiting a new proviso for redemption as in the present case, the ground upon which the ad valorem stamp might be contended to attach is removed, for the instrument is in strict propriety a transfer of mortgage only . . ." The test is the new proviso for redemption, and in the present case there is a new proviso for redemption, and the old equity of redemption is gone. In Davidson's Precedents, vol. ii. p. 694 (2nd ed. 1858), after discussing such an instrument as the present, it is said, "A transfer after this fashion is in fact a new mortgage, and gives the transferee all the rights of an original mortgagee."

Wills, Q.C., in reply. The passage cited from Bythewood refers to a passage in vol. v. p. 537, where the author, writing in 1837, when 55 Geo. 3, c. 84, as amended and partly repealed by 3 Geo. 4, c. 17, s. 2, was the Stamp Act in force says, "It could not have been the intention of the legislature to subject persons availing themselves of the benefit of the exemption in the statute to this inconvenience; the object evidently was that mortgage money which has once paid the ad valorem duty should not be liable again; and therefore strong reasons exist for concluding that it would be held that wherever part of the money advanced by a mortgagee on an estate already in mortgage is applied in liquidation of the existing mortgage debt the deed is a 'transfer of mortgage' within the meaning of the Stamp Act. At the same time it ought to be observed that this opinion has some learned opponents who contend that the introduction into the instrument

1879

WALE v. COMMISSIONERS OF INLAND REVENUE.

of a new proviso for redemption constitutes it for the purpose in question a new mortgage to which the ad valorem duty attaches." Then came 13 & 14 Vict. c. 97, s. 9, which was passed to remove the difficulties created by *Lant* v. *Peace* (1) and other cases, in which it was decided that a transfer of a mortgage required a further duty if it operated as a further security, e.g., if there was a covenant by the mortgagor with the transferee to pay the money. These cases and statutes are fully discussed in Sweet's Supplement to Bythewood and Jarman, tit. Purchase Deeds, p. 149, written in 1850; Hayes' Concise Conveyancer, p. 456, 2nd ed., by Coltman, 1864; and Davidson's Precedents, vol. ii. pt. 2, p. 825, note, 3rd ed. 1869, in all of which the writers support the appellant's contention. Then s. 109 of the Act of 1870 effects the object intended by 13 & 14 Vict. c. 97, s. 9. The result is, that an original mortgage is liable to ad valorem duty; a fresh advance is also liable to an ad valorem duty; and a transfer of an original mortgage is not liable to pay the original ad valorem duty again, but is liable to a transfer ad valorem duty. The present claim of the Crown is the first that has been made since 13 & 14 Vict. c. 97, and the point seems never to have been discovered till now.

Sir H. S. Giffard, S.G., Q.C., in reply. (2) No doubt s. 109 of the Act of 1870 was pointed at *Lant* v. *Peace* (1) and the other cases referred to; but it left a "transfer" still undefined. The test is whether the old debt is extinguished. It is so here, because the covenants to pay it are released.

KELLY, C.B. In my opinion the appellant is entitled to judgment. The ground on which the Crown claims the higher duty is that the instrument is not a "transfer" of a mortgage. I asked who possessed that mortgage the day before the instrument in question was executed, and who possessed it just after the execution? Mrs. Ingram and her trustee had it just before the execution, and immediately after the execution Sutton had it. How did Sutton become the possessor of that mortgage, unless in

(1) 8 Ad. & E. 248.

(2) This right of final reply was claimed on behalf of the Crown, and allowed by the Court.

substance Mrs. Ingram and her trustee transferred the mortgage to her? The particular mode and form in which the change or transfer was carried out, do not affect the question. In substance the effect of the whole transaction was a transfer of the mortgage from Mrs. Ingram and her trustee to Sutton. It may be said that this is an evasion of the rights of the Crown. I think if you can evade the rights of the Crown by keeping yourself out of the operation of a statute imposing a tax upon the public you are at perfect liberty to do so. The parties have done so here. It is true they went through the form of paying off the old debt to Mrs. Ingram; but at the same instant the mortgagor becomes a debtor to Sutton.

In substance, therefore, this is a transfer of a mortgage from Ingram to Sutton, and what led to this roundabout dealing between the parties was, I suppose, that they did not like to trust Wale with the money. If this was not a transfer, how is it that Ingram was a party to the instrument which conveys the premises to Sutton? We are considering what tax should be imposed upon the subject, and when we look at s. 109 of the Stamp Act, 1870, it is clear that the object of the legislature was not to multiply taxation, but, although the securities might be varied and additional security given, to look to the substance of the transaction. In substance this is a transfer of the mortgage from Ingram to Sutton, though it is through the medium or intervention of Wale. The tax has been paid on an instrument which it is not denied has vested in Sutton the mortgage which once was in Ingram, and which could not have passed to Sutton unless in some way or other by the execution of an instrument it had been tranferred to Sutton.

I think, therefore, it comes within the intent of the legislature as a transfer, and that the Crown is not entitled to our judgment.

POLLOCK, B. I also think that the appellant is entitled to judgment, though it has not been without some doubt that I have arrived at that conclusion. The question depends on what view is taken of the 3rd paragraph of the schedule of the Stamp Act,

1879

WALE v. COMMISSIONERS OF INLAND REVENUE.

1870, title "Mortgage." The Solicitor-General argued that the result of the instrument in question is that the first equity of redemption is extinguished and then the original mortgagor conveys the estate to the new mortgagee. But with what meaning does the legislature use the word "transfer"? The words of the schedule are "transfer of any mortgage;" and then there is an ad valorem duty for every 100*l.*, and also for the fractional part of every 100*l.* on "the amount transferred, assigned, or disponed." In ordinary language, what is it that is "transferred or assigned?" It is substantially the debt and interest of the first mortgage. Reading the statute in that sense—and I think it should be read in that sense, especially if there is any doubt in the matter, as being most in favour of the subject—the contention of the appellant is correct.

But, said the Solicitor-General, by this schedule the duty payable is to depend upon "the amount transferred," and he said here there is no amount transferred, because the whole 470*l.* is borrowed on the security of a new mortgage of the whole estate, the mortgage being for the whole undivided sum of 470*l.* But let us look at the substance of the thing. It is true that the first mortgagee is paid off, and that there is not an actual transfer of the debt of 350*l.*, but practically so far as the mortgagor is concerned, and looking at the ordinary use of language by conveyancers, one would say the mortgagee held, not an entirely new mortgage, but a transfer of the old mortgage for 350*l.*

Judgment for the appellant.

Solicitor for appellant: *Williamson, Incorporated Law Society.*
Solicitor for commissioners: *Solicitor of Inland Revenue.*

[IN THE COURT OF APPEAL.]

1879
June 18.

RAY *v.* BARKER.

Practice—Procedure—Rules of the Supreme Court, Order XIV.—Goods received "upon Sale or Return"—Effect of staying Proceedings upon Debtor's Summons for same Debt.

The defendant received from the plaintiff jewelry "upon sale or return;" the defendant delivered it to a woman who, without his authority, pledged it, and he was unable to recover it. The plaintiff thereupon issued a debtor's summons against the defendant for the price of the jewelry; but proceedings upon it were stayed without calling upon the defendant to give security for the amount claimed. The plaintiff did not appeal from the decision upon the debtor's summons. Subsequently the present action was commenced with a specially indorsed writ, and a master directed under Rules of the Supreme Court, Order XIV., that the plaintiff should be at liberty to sign judgment, unless the defendant paid into court the amount claimed within four days:—

Held, that the order of the master could not be set aside; for although, as the plaintiff had not appealed against the decision upon the debtor's summons, it might have been better to refuse to entertain an application under Order XIV., yet the plaintiff was otherwise entitled to sign judgment unless the condition imposed should be complied with, the defendant not setting up a clear defence upon the merits.

Moss v. *Sweet* (16 Q. B. 493; 20 L. J. (Q.B.) 167) commented on.

APPEAL of the defendant from an order of Pollock, B., and Hawkins, J., reversing an order of Stephen, J.

The plaintiff's claim was for 62*l.* 17*s.*, being the price of certain jewelry alleged to have been sold to the defendant, and the writ having been specially indorsed the plaintiff took out a summons under the Rules of the Supreme Court, Order XIV., and the following facts appeared on the affidavits. The plaintiff had, upon the 23rd of February, 1878, sent to the defendant diamond earrings of the value of 40*l.* "upon sale or return." The defendant alleged that he had delivered the earrings to a woman, who stated that she thought she could find a purchaser, but who pledged them and then absconded; a warrant had been issued for her apprehension, but the defendant had been unable to get back the earrings; he did not state the name of the pawnbroker. The defendant did not suggest any defence as to 22*l.* 17*s.*, being the balance of the plaintiff's claim after deducting the above sum of 40*l.* After the

1879

RAY v. BARKER.

plaintiff had become aware that the earrings had been misappropriated, he, upon the 1st of July, 1878, invoiced them to the defendant, and alleged that he was justified in so doing by a custom of the trade. It further appeared that upon the 3rd of December, 1878, before the commencement of this action, the plaintiff took out a bankruptcy summons against the defendant in respect of the amount claimed in this action; the defendant applied to dismiss the summons, and the registrar who heard the application stayed proceedings without calling upon the defendant to give security for the amount, and he directed an action to be tried. The plaintiff did not appeal from the order of the registrar, and took no steps to enforce his claim, and upon the 3rd of May the defendant obtained an appointment for the dismissal of the summons and gave notice thereof to the plaintiff, who, upon the 6th of May, issued the writ in the present action. A master made an order that the plaintiff should be at liberty to sign judgment, unless the defendant should pay into court the amount claimed within four days. Upon appeal to Stephen, J., the master's order was rescinded. Upon appeal to the Exchequer Division it was held that the master's order was right, and that the plaintiff should be at liberty to sign judgment if the money should not be paid into court. The defendant appealed to this court.

Anderson, for the defendant. The claim of the plaintiff is not for a debt or liquidated sum; he really seeks to recover damages for breach of the contract to return the earrings; the writ is not specially indorsed within the meaning of the Rules of the Supreme Court, Order XIV. (1) The liabilities of a person receiving

(1) By Rules of the Supreme Court, Order XIV., rule 1: "Where the defendant appears to a writ of summons specially indorsed under Order III., rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge, why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that he has a good defence to the action on the the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empower-

goods "upon sale or return" was considered in *Ex parte Wingfield, In re Florence* (1); and it follows from that case that from the mere receipt of the goods he does not become the owner of them; he has merely an option to buy them, which must be exercised before he can be charged with the price of them. Moreover the plaintiff did not appeal against the decision upon the debtor's summons; it has therefore been decided by a Court of competent jurisdiction that the plaintiff has not such a primâ facie case as to entitle him to call upon the defendant to give security for the amount claimed, and the master ought not to have made an order in favour of the plaintiff.

Morton Smith, for the plaintiff. The order of the master was rescinded by Stephen, J., under the belief that *Runnacles* v. *Mesquita* (2) shewed that the plaintiff was not entitled to sign judgment; it is submitted that this view was erroneous. The plaintiff relies upon *Moss* v. *Sweet* (3) as establishing that when goods are received "upon sale or return," they must be deemed to have been sold unless they are returned within a reasonable time. In the present case the defendant has kept the earrings for a long time, and has not even yet returned them. It may be conceded for the plaintiff that if he had appealed from the decision of the registrar in bankruptcy, and had failed to obtain a reversal of it, he would not have been entitled to sign judgment under Order XIV.; but as he did not take this course, he is not concluded by the decision of the registrar, and is entitled to avail himself of the order made by the master in the exercise of his discretion.

Anderson, replied.

BRAMWELL, L.J. In my opinion this appeal must fail. Order XIV. no doubt contains useful provisions: it improves the procedure very much in actions for debts, where there is really no defence; for it saves the expense attending the formality of a

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ing the plaintiff to sign judgment accordingly."

Rule 6: "Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a judge may think fit."

(1) 10 Ch. D. 591.

(2) 1 Q. B. D. 416.

(3) 16 Q. B. 493; 20 L. J. (Q.B.) 167.

1879

RAY v. BARKER.

trial at which perhaps the defendant will not appear. Nevertheless it is a remedy, which ought not to be used except where the plaintiff's case is clear: if there be any doubt as to the right to recover, he ought not to be allowed to avail himself of a process, so summary in its nature. By the first rule of Order XIV., an order may be made empowering the plaintiff to sign judgment in an action where the writ has been specially indorsed; but this rule is to be read subject to the sixth rule, which provides that leave to defend may be given either unconditionally or upon terms. Upon the facts before us I do not think that the defendant is entitled to defend unconditionally. I may remark, however, that as the registrar of the Court of Bankruptcy refused to put the defendant under the terms of finding security, the master ought in his discretion to have held his hand and to have declined to make an order: for the plaintiff might have appealed from the decision of the registrar, if he were dissatisfied with it. The question, however, now before us is whether upon the merits the master was justified in making an order empowering the plaintiff to sign judgment, unless the defendant should bring the money into court within four days: and in my opinion the order made by the master was correct. Although the defendant ought not to be permitted to defend unconditionally, yet he is entitled to some opportunity of disputing his liability; for I cannot say that this case in concluded by *Moss* v. *Sweet*. (1) In that case the defendant either might have returned the goods, or was prevented from returning them by his own act, that is, by selling them. In the present case the defendant is unable to return the earrings by the dishonest act of another person; and the Court of Queen's Bench did not decide that if the failure to return, within a reasonable time, goods received "on sale or return" arose from the wrongful act of another person, the person receiving them is to be deemed to have bought them; nevertheless although this point was not decided, I incline to think that the person receiving goods on those terms must under all circumstances either return them within a reasonable time or pay for them. The case set up by the defendant appears to be shadowy, but I cannot say that the action is absolutely undefended. The plaintiff ought not to be at liberty to sign judgment, if the

(1) 16 L. J. (Q.B.) 439; 20 L. J. (Q.B.) 167.

defendant brings the money into court. The master and the judges of the Exchequer Division have held that the defendant ought to have leave to defend only upon the performance of a condition: I cannot say that they have wrongly exercised their discretion, and I cannot overrule their decision. This appeal must be dismissed.

BRETT, L.J. In this case we have to consider what is the true construction of Order XIV. When the existence of the debt has been clearly established upon the affidavits, the plaintiff is entitled to an order empowering him to sign judgment. The defendant, however, is to have leave to defend, either if he has a good defence upon the merits, or if he discloses "such facts as may be deemed sufficient to entitle him to defend." If therefore the defendant shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand made upon him: by the very words of the order the plaintiff is not to be allowed to sign judgment merely because the defendant's affidavit does not shew a complete defence. By the sixth rule a discretion is conferred, and leave to defend may be granted either unconditionally or upon such terms as may be thought just. In the present case the defendant's affidavit did not shew a clear defence. I am strongly of opinion that the principle of *Moss* v. *Sweet* (1) establishes that the defendant in the present case cannot resist the plaintiff's claim: but the decision does necessarily include the facts before us. The facts alleged by the defendant are so far plausible as to entitle him to defend conditionally: this was the view taken by the Exchequer Division; and the condition, which they imposed, was that the defendant should pay the money into court. I think that the order was rightly made. The plaintiff also took proceedings in bankruptcy which did not result in his favour. He then applied to a master for leave to sign judgment: as a general rule, where proceedings taken in bankruptcy to recover a debt, prove abortive, a summons for leave to sign judgment under Order XIV. ought not to be entertained. The master, however, did entertain the application,

(1) 16 Q. B. 493; 20 L. J. (Q.B.) 167.

1879

RAY v. BARKER.

and the view which he took was approved of in the Exchequer Division. Upon taking into consideration all the circumstances of the case, I cannot say that the conclusion at which the master and the judges of the Exchequer Division arrived was wrong: and therefore in my judgment the order appealed from must stand.

COTTON, L.J. I think that the power conferred by Order XIV. ought to be used carefully, and that we ought to consider whether in the present case an order ought to have been made. If the defendant's affidavit sets up a good defence, the Court has no discretion and cannot order the money claimed to be paid into court. But an alternative is allowed in which leave to defend may be given, namely, where the defendant discloses "such facts as may be deemed sufficient to entitle him to defend:" and it is this state of facts to which the discretionary power given by the sixth rule is directed. The affidavit may not make it clear that there is a defence, but the defendant may be able at the trial to establish a bonâ fide defence. I am not satisfied that in the present case a valid defence exists; but the defendant may plausibly argue that he has a good defence. *Moss* v. *Sweet* (1) does not decide this case: the question raised here depends upon the consideration, how far the defendant is exempted from liability by having been subjected to the fraud of another person. The plaintiff relies upon the custom of the trade, as entitling him to charge the defendant with the price of the earrings: how far that may assist him, it is unnecessary now to say: but upon a review of all the facts before us it is pretty clear to my mind what the result of the action will be. If the summons under Order XIV. had come before me in the first instance, I should not have exercised my discretion in favour of the plaintiff: for he had previously taken proceedings against the defendant in the Court of Bankruptcy which had failed, and he had not appealed from the registrar's decision; but the master and the judges of the Exchequer Division have exercised their discretion in his favour, and I cannot say that they have arrived at a wrong conclusion. I have only to add that I agree with the judgments of the other members

(1) 16 Q. B. 493; 20 L. J. (Q.B.) 167.

of the Court, and that in my opinion *Runnacles* v. *Mesquita* (1) has nothing to do with this case. 187

RAY v. BARKER.

Appeal dismissed.

Solicitor for plaintiff: *A. Leslie.*
Solicitor for defendant: *T. C. Russel.*

COLLETT *v.* DICKENSON. *April* 5, 9.

Married Woman—Separate Estate—Action for Debt contracted as Feme Sole—Trustee not a Party—Form of Order.

An action was brought against a married woman for a debt contracted with a creditor who believed her to be a feme sole. She pleaded coverture, and the husband was then made a party. It was alleged that she had separate estate. At the trial it was declared that her separate estate was chargeable with payment of the debt and costs, and an inquiry was directed to ascertain of what her separate estate consisted, and in whom it was vested. In answer to the inquiry the master certified that the separate property consisted of an annuity, secured by the covenant of the husband contained in a separation deed and vested in a trustee. On a summons by the plaintiff to shew cause why he should not be at liberty to sign judgment, and the trustee not being a party:—

Held, that the Court could only make an order declaring the debt (with interest), and the taxed costs of the plaintiff, to be a charge upon the annuity, but without prejudice to any claim by the trustee.

THIS case is reported 11 Ch. D. p. 687.

(1) 1 Q. B. 416.

1879
June 30.

NEALE AND OTHERS *v.* CLARKE AND OTHERS.

Practice—Costs—Claim exceeding 50l.—Recovery of less than 20l. in Contract—Counter-claim and Set-off—County Courts Act, 1867, *s.* 5—*Judicature Act*, 1873, *s.* 67.

The plaintiffs claimed on a balance of accounts a sum of money exceeding 50*l.* The defendants denied their indebtedness, and pleaded by way of set-off and counter-claim that the plaintiffs were indebted to them for money advanced and money due for work done, and goods sold and delivered, and they claimed a balance on the accounts in their favour exceeding 50*l.* The cause was referred to an arbitrator, costs to abide the event. The arbitrator found that the defendants were indebted to the plaintiffs in a sum exceeding 50*l.*, and that the plaintiffs were indebted in like manner to the defendants in a sum exceeding 50*l.*, but that a balance was due to the plaintiffs on the whole account of 11*l.* 10*s.* 3*d.*:—

Held, by Kelly, C.B., that the plaintiffs and the defendants were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county court; and by Hawkins, J., contrary to his own opinion, but on the authority of *Potter* v. *Chambers* (4 C. P. D. 457), that the plaintiffs were entitled to their general costs of action.

THIS was an application for an order calling on the defendants to shew cause why the costs of the cause should not be taxed and paid to the plaintiffs. The facts of the case are stated in the judgment of Kelly, C.B.

March 27. *A. T. Lawrence*, for the plaintiffs, contended, on the authority of *Potter* v. *Chambers* (1), that the plaintiffs were entitled to their costs, and cited *Blake* v. *Appleyard* (2), and *Foster* v. *Usherwood*. (3)

F. A. Bosanquet, for the defendants, contended that the plaintiffs having recovered 11*l.* 10*s.* 3*d.* only, the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 7), deprived them of costs, and that the defendants' set-off and counter-claim in this action were equivalent to a set-off before the Judicature Act. He cited *Garnett* v. *Bradley* (4), and *Walesby* v. *Goulston*. (5)

A. T. Lawrence, in reply.

Cur. adv. vult.

(1) 4 C. P. D. 457.
(2) 3 Ex. D. 195.
(3) 3 Ex. D. 1.
(4) 3 App. Cas. 944.
(5) Law Rep. 1 C. P. 567.

1879

NEALE v. CLARKE.

June 30. KELLY, C.B. In this case the writ was issued on the 12th of June, 1877; and by the statement of claim the plaintiffs demanded 1029*l.* 15*s.* 6*d.*, admitting that this sum was reduced, by payment, to 280*l.* 12*s.* Particulars of the claim were delivered, claiming the above sum of 1029*l.* 15*s.* 6*d.*, and giving no credit, either for payment or set-off. Defendants, who were executors of Thomas Clarke deceased, by their statement of defence, denied the plaintiffs' claim to 1029*l.* 15*s.* 6*d.*, or any part of it, and claimed payment and set-off for money advanced, money had and received, work and labour, goods sold, and a counter-claim; and also claimed a balance to be due to them upon the whole account of 200*l.*

On the 18th of May, 1878, the cause was referred to an arbitrator; costs of the cause to abide the event; costs of the reference and award to be in the discretion of the arbitrator.

On the 28th of June, 1878, the arbitrator awarded that the defendants became, and were indebted to the plaintiffs, in respect of their total claim, in the sum of 1067*l.* 0*s.* 6*d.*; and that plaintiffs were indebted to the testator and the defendants, in respect of the set-off and counter-claim, 1055*l.* 10*s.* 3*d.*; and that the defendants were entitled to set-off this amount against the amount established by the plaintiffs; leaving a balance due from defendants to plaintiffs, upon the whole account, of 11*l.* 10*s.* 3*d.*; plaintiffs to sign judgment for this sum; and he awarded that the defendants should pay all the costs of the reference and award.

The question is, whether by reason of the balance thus finally recovered being under 20*l.*, the plaintiffs become disentitled, under the County Courts Act, 1867, to the costs of the action. And this question was referred by Mr. Justice Field to this Court.

It thus appears, and it lies at the root of the case, that if this action had been brought in the county court, that Court must, at the outset of the trial, have received evidence upon the question, whether the plaintiffs, independently of the set-off and counter-claim, could establish a demand of 1029*l.* 15*s.* 6*d.*, or to the sum to which they had reduced their claim, viz., 280*l.* This the county court had no jurisdiction to do. It became indispensable that this should be ascertained in the first instance, because the defendants had expressly pleaded, and it was the first issue joined

1879

NEALE v. CLARKE.

Kelly, C.B.

in the cause, that no such sum as 1029*l.* 15*s.* 6*d.* was due to the plaintiffs. And if that were so, as it undoubtedly was, whatever in the course of the trial might have been proved, as to payment, set-off, or counter-claim, on the part of the defendants, the Court could not enter upon those questions until the first issue thus joined and arising should be determined; so the case came expressly within the words of s. 67 of the Judicature Act, 1873, that "the relief sought by the plaintiffs can be given in the county court." And even if at that period of the cause the plaintiffs had repeated their admission, in the statement of claim, that by payment, or in any other way, the claim to 1029*l.* 15*s.* 6*d.* had been reduced to 280*l.* 12*s.*, still that sum being beyond the jurisdiction of the county court, that Court had no power to proceed.

Many cases have been cited in which the 5th and 7th and other sections of the County Courts Act, 1867, applied to deprive the plaintiff of his costs, on the ground that he had not recovered a sum (in actions of contract) exceeding 20*l.*, or where the sum indorsed on the writ did not exceed 50*l.*; but in all these cases the relief sought could have been given in the county court. So, though the claim originally exceeded 50*l.*, if it be reduced by payment and admitted set-off or otherwise to a sum not exceeding 50*l.*, an application may be made to a judge at chambers to order the action to be tried in the county court; but no such application has been made or could have been made here. The fact therefore remains, and governs the whole trial of the cause, that for the reason before assigned relief could not have been given in the county court.

Thus, in *Ashcroft* v. *Foulkes* (1), it was held that where an action might have been brought in a county court, and the plaintiff might accordingly have exhibited his plaint in the county court, and where he established a claim to 37*l.* 10*s.* 3*d.*, after giving credit for 20*l.*, and where on the trial the 37*l.* 10*s.* 2*d.* was reduced by payments and by set-off to the sum of 4*l.*, for which a verdict was obtained for the plaintiff, it was held that the plaintiff, inasmuch as he might have brought the action, and the action might have been tried in the county court, was not entitled to recover

(1) 18 C. B. 261.

his costs. But that case, which was decided in 1856, has no application to the present, on the plain ground that the action might have been brought or the plaint levied in the county court. Here it is clear that the action could not have been brought or tried in the county court, because, as before observed, the action was brought to recover, and issue was joined, and must have been tried at the outset, whether the plaintiffs were entitled to recover 1029*l.* 15*s.* 6*d.*, and so relief was sought which could not be given in the county court. The case of *Osborne* v. *Homburg* (1) merely decides that the section which enacts that application may be made to have a case tried in the county court if the claim indorsed on the writ exceed 50*l.*, but is reduced by payment to a sum not exceeding 50*l.*, does not apply where a payment is made after action brought; and this has no bearing upon the present case. This decision was confirmed by the Court of Appeal in the case of *Foster* v. *Usherwood* (2), where it was held that s. 7 of the County Courts Act of 1867 does not give the county court jurisdiction to hear causes sent down from a superior Court, where the claim indorsed upon the writ of summons has been reduced below 50*l.* by payment into court after action brought. So in *Moore* v. *Watson* (3), where an action of contract had been compulsorily referred to a master under s. 3 of the Common Law Procedure Act, 1854, and it was ordered that the costs of the cause should abide the event, and the costs of the reference should be in the discretion of the arbitrator; and the master having awarded to the plaintiff a sum less than 20*l.*, plaintiff was not entitled to costs. Here, again, it was clear that the action might have been brought, and proceeded to a verdict and judgment in the county court, that Court having jurisdiction to try every issue which did arise or could have arisen in the cause.

In *Cowell* v. *Amman Colliery Co.* (4) the award was that the plaintiff was entitled to a sum not exceeding 20*l.*, and the plaintiff recovered that sum accordingly. The Queen's Bench held, after conference with the judges of the Common Pleas and Exchequer, that the plaintiff was not entitled to his costs; but in this case, as in all the others cited, the action being brought to recover a sum

(1) 1 Ex. D. 48.
(2) 3 Ex. D. 1.
(3) Law Rep. 2 C. P. 314.
(4) 6 B. & S. 333; 34 L. J. (Q.B.) 161.

1879

NEALE v. CLARKE.

Kelly, C.B.

under 50*l.* might have been brought and tried in the county court, and so relief might have been sought and given in the county court. All these cases were decided before the passing of the Judicature Act, 1873; and besides in them all the sums recovered by the plaintiffs might have been recovered in the county court.

No case has been cited, or exists, in which the demand in the writ and in the statement of claim is of a larger amount than 50*l.*, and the defendant denies that that sum is due, and issue is joined thereon, so that the Court must proceed to try the question whether such larger sum is due or not, in which it has been held that the county court has jurisdiction, and consequently that relief could be given in the county court.

As to the cases decided in the last century, and for some little time afterwards, under the statute of George II. (1), I think they have no application whatever to the present case. In those times no county courts were in existence, and no questions could arise, respecting the right to costs, by reason of bringing actions in the superior Courts, where recovery might be had, and justice done, in an inferior Court. The object of those Acts was fully attained by the defendants where they set up, and succeeded in establishing, a complete defence to the action of the plaintiffs, being entitled, as in all other cases, to their costs; and it was not unreasonable that the legislature should have entitled a defendant to his costs, where, by overtopping the plaintiffs' demand by means of a set-off, he obtained a verdict and judgment in the cause. Now, however, that the county courts have been established throughout the kingdom, and the Judicature Act has established as law the 67th section of the Act of 1873, in addition to the many other provisions of the County Courts Acts, the principle to be deduced from the whole legislation and law upon the subject is, that if the county court has jurisdiction to try the cause and do full justice to both parties, the plaintiffs shall be bound to sue in the county court under peril of losing their costs, unless they recover at least 20*l.* in actions of contract, and 10*l.* in actions of tort.

Finally, I hold that the proposition which decides this cause is that upon the first issue joined, which the Court that tries the cause is compelled, at the outset of the trial, to proceed to try

(1) 8 Geo. 2, c. 24.

upon the evidence, namely, whether the plaintiffs were entitled to recover 1029*l.* 15*s.* 6*d.*, or, at least, 280*l.* 12*s.*, either of which sums is beyond the amount recoverable in a county court, and that this issue the county court has no jurisdiction to deal with upon the trial. The law, were it otherwise, would be most unreasonable and unjust. It must be remembered that at the time when the plaintiff issued his writ, he must determine what the amount is which he has to claim in the action. He may indeed know that the defendant has a claim against him, to a set-off of several demands; but he has no power to compel the defendant to plead a set-off, and he knows not to what amount, especially in a complicated account, he can establish his set-off if he should plead it. Even if he had the gift of prophecy, and foreknew the amount which could be established, he has no power to compel the defendant to plead it by way of set-off. He knows that the defendant may have good reasons for not pleading it, as that a witness is abroad, or not at hand, or that from other causes he is not able or willing at that time to enforce his demand. If the plaintiffs could guess the amount which could be established against them (in this case it was 1055*l.* 10*s.* 3*d.*), and deduct that sum from the amount which they knew they should be able to prove to be due to themselves and were to bring an action for the balance only of 11*l.* 10*s.* 3*d.*, stating it to be as it really was, the balance of a large account, exceeding 1000*l.* on each side, between themselves and the defendants, I do not see what would prevent the defendants from paying that small sum into court, together with the costs of the action up to that time, and afterwards bringing their action against the plaintiffs for upwards of 1000*l.*, which they could prove that they were entitled to by way of set-off.

Finally, this action having been brought and tried upon two issues joined between the parties, the one, whether the plaintiffs were entitled to a sum of 1029*l.* 15*s.* 6*d.*, or, as it turned out, of 1067*l.* 0*s.* 6*d.*, and the other, whether the defendants were entitled to set-off and counter-claim to the amount of 1055*l.* 10*s.* 3*d.*; both of which sums were beyond the jurisdiction of the county court, that Court had no power to try these issues in the cause, and consequently the plaintiffs were by law justified in bringing the action in a superior Court, from which it was referred to arbitration; and

1879

NEALE v. CLARKE.

Kelly, C.B.

the plaintiffs having established their claim to one of these large sums, and the defendants to the other, I am of opinion that as the plaintiffs have obtained the award, and judgment in their favour for 11*l.* 10*s.* 3*d.*, the plaintiffs are entitled to the costs of the issue found for them; and the defendants to their costs, in respect of the issue upon which they have succeeded, and that our judgment ought to be pronounced accordingly.

I have thought it right to state the grounds of my opinion fully and explicitly, and especially with reference to the former state of the law, and to the authorities which have been cited; chiefly because, I regret to say, that my learned Brother Hawkins takes a different view of this case from my own; but in truth the whole question and the case itself are concluded by a clear and decisive authority directly in point by the Court of Queen's Bench; from which, even if my opinion were against it, I should not consider this Court at liberty to depart. In the case of *Potter* v. *Chambers* (1) the plaintiff brought his action for 114*l.* 8*s.*, which the defendant denied that he owed to him, and pleaded a set-off and counter-claim to the amount of 109*l.* 16*s.* Both parties succeeded in establishing their respective claims, and the verdict and judgment were entered for the plaintiff for the balance of 4*l.* 12*s.*, and no more. The arguments which have been urged in this case were addressed to the Court, first upon a motion by the defendant to enter the judgment distributively for each party (2), which was refused; and afterwards for a review of the taxation of costs by the master, who had taxed them in favour of the plaintiff. The Court after full consideration held that the 67th section of the Judicature Act, 1873, had no other application to the case than that the plaintiff could not have obtained relief in the county court, and therefore was entitled to bring his action in the superior Court, and accordingly held the plaintiff entitled to his full costs.

HAWKINS, J. The question in this case is one of great practical importance, viz., whether where a plaintiff in an action in a superior Court establishes an original claim to an amount exceeding that over which a county court has jurisdiction, but which by

(1) 4 C. P. D. 457; 48 L. J. (N.S.) Q. B. 274.

(2) See *Potter* v. *Chambers*, 4 C. P. D. 69.

1879

NEALE v. CLARKE.

Hawkins, J.

set-off is reduced to or below the sum of 20*l.* in contract, or 10*l.* in tort, the 5th section of the County Courts Act, 1867, as limited by the 67th section of the Judicature Act, 1873, operates so as to deprive him of his costs of suit.

It came before us in the shape of an application to review the taxation of the master who had declined to tax the plaintiffs their costs under these circumstances.

The plaintiffs on the 12th of June, 1877, issued a writ against the defendants as executrix and executor of Thomas Clarke, deceased, claiming by the indorsement a sum of 1029*l.* 15*s.* 6*d.* for money had and received by the testator for the plaintiffs. By their statement of claim delivered the 8th of August, 1877, the plaintiffs alleged that the testator as agent for the plaintiffs received for them divers sums of money, and paid over to them divers small sums, leaving a balance of 280*l.* 12*s.* still due to them. Particulars of the plaintiffs' demand were delivered on the 20th of August, setting forth the items as due to the plaintiffs amounting to 1029*l.* 15*s.* 6*d.*, but allowing no credits to the defendants. By the statement of defence, delivered the 7th of November, 1877, the defendants denied the claim, and also alleged payment and pleaded set-off and counter-claim for money advanced, money had and received, work and labour done, and for goods sold and delivered (all matters of pure set-off), and they claimed from the plaintiffs 200*l.* as a balance due to them, the defendants. Upon this statement of defence issue was joined. On the 18th of May, 1878, by consent "the cause" was referred to an arbitrator upon the following (amongst other) terms, viz., "that the costs of the said cause shall abide the event, and that the costs of the reference and award shall be in the discretion of the said arbitrator." On the 28th of June, 1878, the arbitrator made his award, and by it found that the testator in his lifetime, and the defendants as his personal representatives became and were indebted to the plaintiffs in respect of their claim in the total sum of 1067*l.* 0*s.* 6*d.*, and he found with respect to the set-off and counter-claim that the plaintiffs became and were indebted to the testator in his lifetime, and to the defendants as his personal representatives in 1055*l.* 10*s.* 3*d.*, and that the defendants were "entitled to set-off and counter-claim such last mentioned sum against the amount

1879

NEALE v. CLARKE.

Hawkins, J.

found to be due on the plaintiffs' claim," leaving thus a balance of 11*l.* 10*s.* 3*d.* due from the defendants to the plaintiffs, for which balance the plaintiffs were entitled to sign final judgment, which they did—and he directed the defendants to pay all the costs of the reference and award.

Upon the plaintiffs carrying in their costs of the cause for taxation the master disallowed them, on the ground that the plaintiffs having recovered a sum not exceeding 20*l.*, were by reason of the County Courts Act, 1867, disentitled to them. On appeal made to Field, J., at chambers for an order to review this taxation, he referred the matter to this division, and hence we are called upon to decide it.

It has been long since established that no matter how the claim of a plaintiff may be reduced, whether by proof of payment, set-off, or otherwise, the sum for which he is entitled to sign judgment is the sum "recovered" within the meaning of the County Courts Acts: *Ashcroft* v. *Foulkes* (1); *Osborne* v. *Homburg* (2); *Foster* v. *Usherwood.* (3) See also *Staples* v. *Young.* (4)

It must also be considered as settled that where by an order of reference the costs of the cause are "to abide the event," it means the event with its legal consequences, and those words have no effect to entitle the plaintiffs to costs if he would otherwise be deprived of them by the operation of the County Court Acts: *Cowell* v. *Amman Colliery Company* (5); *Moore* v. *Watson.* (6)

In the present case the event of the award is that the plaintiffs have recovered a sum not exceeding 20*l.*, and consequently under s. 5 of the County Courts Act, 1867, would not have been entitled to any costs of suit, in the absence of a certificate or order as mentioned in that section. The 67th section of the Judicature Act, 1873, however limited the operation of that 5th section to actions "in which any relief is sought which can be given in a county court." It remains, therefore, to be seen whether the "relief sought" by the plaintiffs in this action could be so given. Now what within the meaning of s. 67 is the relief which is sought by a plaintiff in an action? It cannot be determined by

(1) 18 C. B. 261.
(2) 1 Ex. D. 48.
(3) 3 Ex. D. 1.
(4) 2 Ex. D. 324.
(5) 6 B. & S. 333; S. C. 34 L. J. (Q.B.) 161.
(6) Law Rep. 2 C. P. 314.

the amount indorsed on the writ, or that claimed in the statement of claim. So to construe the words would in effect put it in the power of a plaintiff in all cases to evade the operation of the County Courts Act, by making a claim exceeding 50*l.*, regardless of what he might ultimately recover, or even seek to establish by evidence. Neither can those words mean the sum to which the plaintiff bonâ fide believes himself entitled, for that might be to make the costs dependent on the moderation or extravagance of the plaintiff's views. Some limitation must be put upon these words, and, after much consideration, it seems to me that the "relief sought" may most reasonably be interpreted to mean that amount or balance which is really due to, and which the plaintiff is entitled to sue for and recover, without foregoing any portion of his just demand, that is, the relief to which he is entitled, and that is, in my opinion, the relief he seeks in the action within the meaning of the 67th section of the Judicature Act, 1873.

In considering this question in cases where the plaintiff's original claim, so far as it is unextinguished by payment, and at the commencement of the action exceeds 50*l.*, and so is beyond the jurisdiction of the county court, but is reduced below that sum by matter of defence which falls short of shewing that the debt was to that extent extinguished, as, for instance, by payment before the writ was issued; it is all important, in my view, to bear in mind the distinction between that which is matter of defence in the nature of set-off as allowed by the statute of Geo. II., and that which is matter of pure counter-claim as allowed by the Judicature Act, 1873, and the orders framed thereunder. Both set-off and counter-claim under the Judicature Act are in one sense cross-actions, but there is a wide difference between them. A set-off is a debt allowed by the statute of Geo. II. to be set-off against another debt, and for it the plaintiff may in his particulars give credit so as to prevent the defendant from again setting it up. A counter-claim, as distinguished from a set-off allowed by the statute of Geo. II., is nothing but a mere cross-action, allowed by the legislature to be pleaded at the defendant's option, in order to avoid multiplicity of suits between the same persons; but in no case can the plaintiff compel the defendant to set up his counter-claim, and under no circumstances is he empowered to give credit

1879

NEALE v. CLARKE.

Hawkins, J.

to the defendant for what he conceives to be due upon it, so as to make that credit binding on the defendant. It is entirely in the option of the defendant to set up his counter-claim, or to reserve it as the subject of an action in which he will be the plaintiff. It is essential, therefore, that a plaintiff should in all cases where a counter-claim is all that can be opposed to his action, sue for the whole amount of his demand, and unless the defendant thinks fit to avail himself of the privilege allowed him by the Judicature Act, he is entitled to recover that amount in its integrity. In such a case he cannot, according to my construction, obtain the relief he seeks in the county court. He cannot, however willing he may be to do so, give credit for the counter-claim, and sue for what he conceives to be the just balance due to him.

Before the coming into operation of the County Court Rules allowing a plaintiff to give credit for a set-off in his particulars, the law was the same with regard to set-off. For although the statute of Geo. II., where there were mutual debts between the plaintiff and the defendant, allowed one debt to be set against the other it left it optional with a defendant to avail himself of that privilege, and so the law remained until the General Rules of Trinity Term, 1853, when by Rule 13 the plaintiff, in order to save the expense of a plea of set-off was permitted to give credit for a set-off in his particulars. This privilege, however, was not accorded to suitors in the county courts until the 35th of the County Court Rules of 1856 (made under 19 & 20 Vict. c. 108, s. 32), took effect. It will be useful to bear in mind that it was with reference to the law as it stood before that period that it was held in *Woodhams* v. *Newman* (1), in 1849, *Beswick* v. *Capper* (2), *Turner* v. *Berry* (3), in 1850, and other cases which I need not mention, that a claim reduced by set-off within the jurisdiction of a county court did not fall within the operation of the then existing County Courts Act. The reason of these decisions is thus expressed by Pollock, C.B., in *Turner* v. *Berry* (3). Speaking of a set-off, he said: "It is in the nature of a cross-action, and you cannot compel a man to set-off his claim, or accept credit for it against another." The case of *Walesby* v. *Goulston* (4), which was cited and relied on

(1) 7 C. B. 654.
(2) 7 C. B. 669.
(3) 5 Ex. 858.
(4) Law Rep. 1 C. P. 567.

as a strong authority (as undoubtedly it is) in favour of the plaintiff's right to his costs, was, it is true, decided in the year 1866, long after the County Court Rules to which I have referred. The question in that case arose under the 24th section of the County Courts Act, 1856 (19 & 20 Vict. c. 108), by which jurisdiction was given to a county court to try actions where "the debt or demand claimed consists of a balance not exceeding 50*l.* after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff. The Court held that "admitted set-off" meant a set-off admitted before action brought. Erle, C.J., adding, "No doubt the plaintiff might have admitted the set-off and issued a plaint in the county court, but, in my opinion he had an option whether he would make the admission or not." It is manifest, on reading the report of that case, that Willes, J., did not cordially acquiesce in that decision.

Before discussing the 5th section of the County Courts Act, 1867, it will be convenient shortly to summarize the substance of the statutory enactments touching the subject in question, up to the passing of that Act. By the original County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 129, a plaintiff who recovered in a superior Court less than 20*l.* in contract or 5*l.* in tort for a cause, for which "a plaint might have been entered in the county court," was entitled to such sum only and no costs. But to deprive him of such costs, it was necessary to enter a suggestion on the roll—an inconvenient and expensive process. By 13 & 14 Vict. c. 61, s. 1 (passed in 1850), the necessity for a suggestion on the roll was superseded; and the plaintiff who recovered a sum not exceeding 20*l.* in contract or 10*l.* in tort, was entitled to judgment for such sum only and no costs, though power was given by ss. 12 and 13 to the Court or a judge to direct that the plaintiff should recover his costs if, inter alia, "the action was brought for a cause for which no plaint could have been entered in the county court." By s. 4 of 15 & 16 Vict. c. 54 (1852), it was made imperative upon the Court or judge so to direct in the event last mentioned.

In this state of things it was that the County Courts Act, 1867, was passed, by the 5th section of which it is enacted that "if in any action commenced after the passing of this Act in any of her Majesty's Superior Courts of Record, the plaintiff shall recover a sum not exceeding 20*l.* if the action be founded on contract, or

1879

NEALE v. CLARKE.

Hawkins, J.

10*l.* if founded on tort, he shall not be entitled to any costs of suit unless the judge certify that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs." It will be observed that by this section there is no reservation of any right to costs, even in actions which could not by law, even with the consent of both parties, be instituted in the county court; such for instance as actions for breach of promise of marriage, and slander. It is clear that under this section the plaintiff, whose claim (in contract) for a sum far beyond the county court jurisdiction was reduced to or below 20*l.* by set-off, would not have been entitled to any costs unless he obtained such certificate or order, the granting of which was entirely a matter of discretion.

The effect of this was practically to deprive of all remedy or relief many of those who had small causes of action for matters over which the county court had no jurisdiction. It was to remedy this state of things, and not to confer upon any plaintiff an option to sue in a superior or a county court, that the 67th section of the Judicature Act, 1873, whilst it preserved the 5th section of the County Courts Act, 1867, limited its operation to actions in which "any relief is sought which can be given in a county court." Upon these words it is this question now arises. Could the relief sought by the plaintiff be given in a county court? I answer that question by saying it could, had the plaintiff thought fit to adopt the proper means to obtain it.

I have already referred to the 35th rule of the County Court Rules of 1856; I have now to call attention to the County Court Orders of 1875. By Order VII., rule 1, after requiring the plaintiff at the time of the entry of his plaint to file particulars of his demand, it is provided that, "Where the demand exceeds 50*l.*, but the plaintiff desires to abandon the excess, or to admit a set-off, and sues in the county court for the residue, the abandonment of the excess or the admission of the set-off shall be entered at the end of the particulars;" and by Order VIII., rule 4, the particulars are to be deemed to be part of the summons to the defendant to appear. In the present case it is clear the plaintiffs might have given the defendants credit for their set-off, and obtained in the county court all the relief which by the award they have been found entitled to, viz. the balance of 11*l.* 10*s.* 3*d.*

I do not feel pressed by the earlier authorities.

First, because of the County Court Rules permitting a plaintiff to give credit for a set-off which he could not have done before 1855.

Secondly, because it was obviously the intention of the legislature in passing the 5th section of the County Courts Act, 1867, to deprive plaintiffs of costs in all cases where the sums recovered were within the prescribed amounts, and it must not be forgotten that that Act was passed within a year after the decision in *Walesby* v. *Goulston*. (1)

Thirdly, because the language of the 67th section of the Judicature Act, 1873, differs from that used in the County Court Acts, and I think the legislature did not intend to reserve, and has not reserved, to plaintiffs any option to sue in the superior Court in cases like the present, but has only removed from the operation of the 5th section of the County Courts Act those actions in which the relief sought could not be given in a county court. To hold otherwise would be to put it in the power of any plaintiff with whom a debt of 51*l*., made up of a number of small items, had been incurred to sue in a superior Court and recover his costs, though his claim might be reduced to 20*s*. by a set-off which he knew to be due, but obstinately refused to give credit for.

It was urged that to compel a plaintiff to give credit for a set-off, at the peril of losing his costs in the event of his not recovering more than 20*l*., would be to impose a difficulty upon him, for that he might be unable to determine the exact amount of his indebtedness to the defendant. I fail to see the force of this argument; every defendant is placed in a similar difficulty. When sued by a plaintiff he has to determine the amount he will pay into court. Moreover, it must not be forgotten that the judge or Court has power in all cases to award, or deprive of, costs if the circumstances of any particular case should make it expedient that he should do so.

I desire, however, to say that my judgment is intended to apply only to cases of strict set-off of mutual debts under the statute of Geo. II., not to cases where a plaintiff's claim is reduced by a counter-claim as allowed to be set up for the first time by the

(1) Law Rep. 1 C. P. 567.

1879

NEALE v. CLARKE.

Hawkins, J.

Judicature Act and Orders. Such a counter-claim is in the nature of a pure cross-action, for in it the plaintiff has no power to give credit in his particulars, nor can he compel the defendant to set it up in his defence. He has therefore no option but to sue for his whole demand, and unless he does so he cannot obtain the relief to which he is entitled, and if he succeed in establishing his own claim to an extent exceeding 50*l.* he is, in my opinion, entitled to his costs, even though the defendant by a counter-claim may succeed in reducing the amount for which final judgment may be signed to a sum not exceeding 20*l.* in contract or 10*l.* in tort. More than this, I think he is entitled to his costs, even should the defendant succeed by means of his counter-claim in turning the balance in his own favour, and so entitle himself to judgment for that balance: see *Cole, Marchant, & Co.* v. *Firth* (1), decided by the Lord Chief Baron and Pollock, B., on the 12th of May last. The cases of *Staples* v. *Young* (2), *Blake* v. *Appleyard* (3), and *Potter* v. *Chambers* (4), have no bearing upon the matter now under discussion. I refrain, therefore, from discussing them.

I am aware that the view I have expressed may be thought not to accord with that taken in *Potter* v. *Chambers* (5). I cannot, however, help thinking that that case, which was very little argued, was decided upon the assumption that the plaintiff's claim was reduced below 20*l.* by counter-claim as distinguished from set-off. Nevertheless, as reported, that case certainly does appear to support the view taken by the plaintiffs, and I feel myself therefore bound by it. The question, however, is of such practical importance, that I have thought it right to express my own view upon the subject, though, of course, with great diffidence, seeing that my Lord entertains an opposite opinion.

The order of the Court will therefore be for the master to review his taxation.

Order to review the taxation.

Solicitors for plaintiffs: *Rooks & Co., for G. H. Saunders, Chipping Norton.*

Solicitors for defendants: *Mackeson, Taylor, & Arnould, for Kilby & Mace, Chipping Norton.*

(1) Post, p. 301.
(2) 2 Ex. D. 324.
(3) 3 Ex. D. 195.
(4) 4 C. P. D. 69.
(5) 4 C. P. D. 457.

COLE, MARCHANT, & CO. *v.* FIRTH AND ANOTHER. 1879 *May* 12.

BY the statement of claim, the plaintiff sought to recover 404*l.* 17*s.* 9*d.* for work and labour done and material supplied by them as engineers. The statement of defence traversed the allegations of the claim, and alleged that the work was not according to contract and was useless to the defendants, and in a counter-claim the defendants alleged loss arising from the breach of contract of the plaintiff, and they claimed 480*l.* as damages.

The cause and counter-claim were referred to an arbitrator, "costs of the cause and counter-claim to follow the event, costs of the reference and award to be in the discretion of the arbitrator. The parties in whose favour the award should be made to be at liberty to sign judgment for all sums of money awarded as due to them, and for all costs to which they should be entitled."

The arbitrator awarded that the plaintiffs were entitled to recover 371*l.* in respect of their claim, and that the defendants were entitled to recover 375*l.* in respect of their counter-claim. And he awarded that the plaintiffs should pay to the defendants the balance of 4*l.* accordingly, and that the plaintiffs should bear the costs of the reference and award. The district registrar ordered judgment to be signed for the defendants for the sum of 4*l.* and for the costs of the cause, counter-claim, reference, and award to be taxed.

Upon appeal, Field, J., referred the matter to the Court.

R. O. B. Lane, for the plaintiffs, moved to vary the order.

Wills, Q.C. (with him, *Cyril Dodd*), for the defendant.

THE COURT (Kelly, C.B., and Pollock, B.) directed so much of the registrar's order as related to costs to be struck out and the following to be inserted instead thereof: "the costs of and relating to the plaintiffs' claim and the proof thereof to be paid by the defendants, and the costs of and relating to the defendants' counter-claim and the proof thereof to be paid by the plaintiffs."

Order accordingly. (1)

Solicitors for plaintiffs: *Layton & Jacques, for Watson & Dickens, Bradford.*

Solicitors for defendants: *Flower & Nussey, for Wood, Hellick, & Hutton, Bradford.*

(1) See *Chatfield* v. *Sedgwick*, 4 C. P. D. 459.

1879
July 2.

THE LOCAL BOARD OF HEALTH FOR THE DISTRICT OF THE PARLIAMENTARY BOROUGH OF MALTON, APPELLANTS; THE MALTON FARMERS MANURE AND TRADING COMPANY (LIMITED), RESPONDENTS.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55)—*Offensive Trades—Effluvia a Nuisance or injurious to Health.*

The case of an offensive trade causing effluvia is within s. 114 of the Public Health Act, 1875, if the effluvia, though not injurious to persons in sound health, cause sick persons to become worse.

Per STEPHEN, J.: It is not necessary, to constitute an offence under that section, that such effluvia, if they amount to a nuisance, should also be injurious to health.

Great Western Ry. Co. v. *Bishop* (Law Rep. 7 Q. B. 550) considered.

CASE stated by justices on a complaint by the appellants, as the urban sanitary authority for the district of the parliamentary borough of Malton, against the respondents, under s. 114 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for unlawfully carrying on their trade so as to be a nuisance, and so as to cause effluvia which were a nuisance, and injurious to the health of the inhabitants of the district.

The respondents were the occupiers of certain buildings in which the process or manufacture of artificial manures (including bone manures and the dissolving of bones and coprolites with sulphuric acid, but not the boiling or burning of bones), was extensively carried on, and during the process of manufacture, or whilst the hot product was being moved after manufacture, or during the storage of material, effluvia were thrown off in large quantities, a considerable portion of which escaped from the buildings, and had been from time to time on certain occasions, but not continuously, according to the direction of the wind, blown or carried into some parts of the town forming the district of the sanitary authority. Numerous complaints had been made of a nuisance arising therefrom to the inhabitants, and the medical officer of health for the district certified to the appellants, under the provisions in that behalf of the 114th section of the Public Health Act, 1875, that the building or place in the occupation of the respondents used for the crushing and dissolving of bones, the

manufacture of manures, and the carrying on of the trade, business, process, or manufacture causing effluvia, was a nuisance, and injurious to the health of the inhabitants of the district, which certificate was put in evidence at the hearing of the complaint.

The evidence on behalf of the appellants went to shew that the effluvia were offensive, and had on the occasions in question materially interfered with the comfort and enjoyment of the inhabitants in the streets and at the Malton station of the North Eastern Railway Company, about 200 yards from the works; and that such effluvia penetrated into some of the houses within the district, causing the inhabitants to close their windows, and in one or two instances nausea and vomiting were attributed to it; but the appellants' principal medical witness did not think there was anything in the vapours to make people sick. The medical officer of health adhered to the statement in his certificate that the works caused a nuisance and effluvia which were injurious to health, whereas other medical men also called by the appellants, whilst giving it as their opinion that the effluvia might make sick people worse, and cause nausea, yet did not think any permanent injury to health would arise therefrom.

At the close of the case for the appellants it was contended, on behalf of the respondents, that this was not a nuisance proved to be injurious to health, and that under the wording of the 114th section of the Act, taken in conjunction with the definitions of nuisances liable to be dealt with summarily under the Act, and contained in the 91st section, particularly sub-s. 6, and also on the authority of the case *Great Western Ry. Co.* v. *Bishop* (1), the justices had no jurisdiction to determine summarily a charge of causing a nuisance preferred under the Public Health Act, unless such nuisance was proved to be injurious to health.

On behalf of the appellants, it was contended that *Great Western Ry. Co.* v. *Bishop* (1) did not govern the present case, inasmuch as it was decided under the old Nuisance Removal Act (18 & 19 Vict. c. 121), and that the nuisance complained of in that case was one which could not possibly have proved injurious to health, being a mere inconvenience, and therefore decided not to be within the scope of the Sanitary Act, but that the present

(1) Law Rep. 7 Q. B. 550.

1879

MALTON BOARD OF HEALTH v. MALTON MANURE CO.

complaint was preferred under a special clause of the Public Health Act, 1875, dealing with offensive trades, and the nuisance complained of was one where it was possible injury to health might follow, and was within the strict meaning of the Act; and that the 114th section must contemplate that the justices had summary jurisdiction whether the business carried on was a nuisance simply, or that the business carried on caused an effluvium which was a nuisance, or whether there was a nuisance injurious to health, and that it was not necessary to prove it to be injurious to health.

The justices were of opinion that the appellants had proved a nuisance to exist in the ordinary sense of the word, yet that according to the provisions of the Public Health Act, 1875, and on the authority of the case quoted, it was necessary to be proved that the nuisance was likewise injurious to health, and on that point it did not appear that the case for the appellants was satisfactorily made out, it being shewn however that sick persons might to a certain extent suffer from it, but not permanently. They therefore dismissed the complaint.

The questions of law for the opinion of the Court were:

First. Was it necessary on the part of the appellants to prove as part of their case not only that a nuisance was caused by the effluvium, but also that it was injurious to the health of the inhabitants of the district?

Secondly. If the Court should so decide, then did the appellants sufficiently prove the effluvium to be "injurious to health," within the meaning of the statute, by evidence that some nausea that was felt was probably caused by it, and that it would make sick persons within its influence worse, though in the opinion of the principal medical witness it was not actually injurious to health?

Herschell, Q.C., for the appellants. It is sufficient that there is a nuisance, though it may not be injurious to health. The words of the section are "nuisance *or* injurious" to health, and no difficulty arises from the general character of the expression "nuisance," for the limited meaning to be attached to it is suggested by its occurring in a group of sections relating to offensive trade.

Cave, Q.C., for the respondents. The words in s. 114 are substantially the same as those in 18 & 19 Vict. c. 121, s. 27, and the case of *Great Western Ry. Co.* v. *Bishop* (1) shews that the word "nuisance" cannot be taken in its general meaning but as meaning a nuisance which in itself is injurious to health.

Herschell, Q.C., was not called on to reply.

KELLY, C.B., I should be sorry to put a construction upon this Act of Parliament which would prevent traders from carrying on their business in a reasonable way, with reference to the rights of their fellow creatures. But I am of opinion, on the facts disclosed by this special case, that the appellants are entitled to our judgment. That which must govern our decision is the language of the 114th section of the Public Health Act. Looking first, however, at the 112th section, it is clear that the object of this group of sections, under the heading "offensive trades," was to regulate noxious or offensive trades, businesses, or manufactures. The 114th section enumerates various places used for carrying on various trades, but includes in general words any place used for any trade, business, process, or manufacture causing effluvia. If such a place is certified to be a nuisance or injurious to the health, not of the inhabitants generally, but of any of them, complaint is to be made and an inquiry is to be held whether the business carried on is a nuisance, or causes any effluvium which is a nuisance or injurious to the health of any of the inhabitants of the district.

The question is whether, on the facts before us, it appears that the effluvium from this place is a nuisance or injurious to the health of any of the inhabitants of the district. The 6th paragraph of the case states that a nuisance had been proved to exist, and it is not necessary that there should be an injury to the health of the inhabitants generally. The Act requires that there should be an injury to the health of some of the inhabitants, and that, the the 6th paragraph shews, is the case. For in answer to the second question I am clearly of opinion that any effluvium such as that complained of, which had the effect of causing any person who is ill to become worse, is within the Act. The effluvium is the gravamen of the grievance complained of, and that has caused

(1) Law Rep. 7 Q. B. 550.

1879

MALTON BOARD OF HEALTH v. MALTON MANURE CO.

sick persons to become worse. It is clear that this comes within the strict words of the Act as an injury to health, and the second question must be answered in the affirmative.

STEPHEN, J. There are two questions reserved by the justices. To the first of them I answer that it was sufficient to prove that, the manufacture being one causing effluvium, such effluvium was a nuisance whether causing injury to health or not. The four sections commencing with the 112th, relate to the subject of offensive trades, some of which are enumerated, and the others dealt with by general words. The 114th section speaks of effluvia which are a nuisance or injurious to health, and it is said this must be read as if it ran, "a nuisance injurious to health." I do not think that is its meaning, and it obviously is not its literal meaning. The way in which it is sought to shew that it is its proper meaning, is by reference to 18 & 19 Vict. c. 121, and the case of the *Great Western Ry. Co.* v. *Bishop* (1), decided on the construction of the 8th section of that Act. That decision, regard being had to the subject-matter of it, seems to me to come to this (a principle which is contained in part of the judgment of the Lord Chief Justice), that the word "nuisance" cannot there be taken in its fullest sense, as that would lead to some obvious absurdities. It is said then that, in the Act in question, the word must be restricted to nuisances affecting the public health, because that was the object of the Act, and must not be extended to nuisances with which it was not the intention of the Act to deal. Applying that principle to this enactment, it seems to me that in these sections the word nuisance must mean any nuisance connected with the carrying on of any offensive trade specified, and that the diminution of comfort thereby, is one of the nuisances included in the Act. I am not convinced by Mr. Cave's argument as to the analogous section of 18 & 19 Vict. c. 121, because the sections under this heading, "offensive trades," in the Act we are now considering, are complete in themselves.

In the view I take it is not necessary to decide the second question, but on this point I quite agree with my Lord. On a fair construction of the language used in the case, I think it is shewn

(1) Law Rep. 7 Q. B. 550.

that sick persons might suffer in their health, and that is an injury to health. I will only add that it seems to me that the kind of smell which makes sick people worse must interfere with the vigour and vitality of those who are well; but at all events it is sufficient to shew that sick persons are injured thereby.

Case remitted accordingly.

Solicitors for appellants: *Williamson, Hill, & Co., for Hugh W. Pearson, Malton.*

Solicitors for respondents: *Emmett & Son, for H. Jackson, Malton.*

LEFTLY *v.* MONNINGTON.

July 8.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 2, 54—*Vestry —Member becoming Bankrupt—Churchwarden.*

A churchwarden of a parish named in Schedule B of the Metropolis Local Management Act, 1855, is a member of the vestry of that parish within the meaning of s. 54, and is liable to a penalty if, after becoming bankrupt, he acts as a member of such vestry.

CASE stated in an action to recover 50*l.* penalty and costs of suit against the defendant for voting, after being adjudicated a bankrupt, at a meeting of the vestry for the parish of Plumstead, contrary to the provisions of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 54.

On the 20th of August, 1878, and for some months prior thereto, the defendant was churchwarden of the parish of Plumstead, and by virtue of his office of churchwarden, and not otherwise, was part of the vestry of the parish. On the 14th of June, 1878, he was adjudicated a bankrupt. On the 20th of August, 1878, the defendant attended a meeting of the vestry of the parish of Plumstead, and acted at such meeting by voting upon a resolution submitted to the vestry meeting.

The 2nd section of the aforesaid Act provides that the incumbent and churchwardens of each of the parishes referred to in Schedule B (of which Plumstead is one) shall constitute a part of the vestry, and shall vote therein in addition to the elected vestrymen. Sect. 54 provides that any member of any vestry for any

1879

LEFTLY v. MONNINGTON.

parish mentioned in the schedule who shall be declared bankrupt shall thereupon cease to be such member; and any person who acts as a member of such vestry after ceasing to be such member as aforesaid, and any person who acts as a member of any such vestry as aforesaid without being qualified by rating and occupation, as required by the Act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same.

The question for the opinion of the Court was whether the defendant, being a part of the vestry only by virtue of his office of churchwarden, was liable to the penalty?

W. M. Baylis, for the plaintiff, was not heard.

T. Willes Chitty, for the defendant. The 2nd section enacts that the incumbent and churchwardens shall be part of the vestry and vote in it, but that does not make them members of the vestry within s. 54. That section was intended to apply to elected members only, as is shewn by the reference to the qualification by rating and occupation. If it applies to churchwardens, it applies equally to the incumbent, which certainly was not within the evil aimed at. Besides, if the incumbent and churchwardens were all bankrupt, no vestry could be held: *Reg.* v. *Tottenham.* (1)

PER CURIAM (Kelly, C.B., and Stephen, J.). A person who is part of a vestry and votes in it cannot be otherwise than a member of it. The minute consequences of the Act may not have been considered, but there can be no doubt as to the meaning of the language used. The plaintiff is entitled to judgment with costs.

Judgment for the plaintiff.

Solicitor for plaintiff *E. Kimber.*
Solicitor for defendant: *T. Kipping.*

(1) 4 Q. B. D. 367.

[IN THE COURT OF APPEAL.]

1879
June 27.

MIDGLEY AND ANOTHER *v.* COPPOCK.

Vendors and Purchasers—Contract of Sale—Agreement by Vendor to discharge all "Outgoings" before the Completion of the Purchase—Charge upon Houses for Improvement of Street.

The plaintiffs bought of the defendant three houses, and by the contract of sale the latter agreed to discharge "all rates, taxes, and outgoings" up to the time of completion. The purchase was completed, and afterwards payment was demanded from the plaintiffs of the expenses incurred under a local Act in improving the street in which the houses stood. The work had been done some time before the houses belonged to the defendant, and at the time of sale to the plaintiffs neither party was aware of the charge. The plaintiffs, having paid the sum demanded, sued to recover the same from the defendant:—

Held, that the charge for improving the street was an "outgoing" which the defendant had bound himself to discharge, and that the plaintiffs were entitled to recover it from him.

ACTION to recover the sum of 70*l.* 19*s.* 3*d.*

At the trial before Lopes, J., the following facts were proved:—

By an agreement dated the 29th of June, 1877, the plaintiffs entered into a contract to buy of the defendant three houses called Richmond Terrace, Stockport Road, Manchester. The contract of sale contained the following clause: "All rent, rates, taxes, and outgoings payable in respect of the premises shall be received and discharged by the vendor up to the time of completion, such rents and outgoings being apportioned if necessary." The purchase was to be completed upon the 29th of July, 1877. In the year 1873 the corporation of Manchester, under the powers of the Manchester General Improvement Act, 1851 (1), had caused the street in which the houses stood to be paved, sewered,

(1) By the Manchester General Improvement Act, 1851 (14 & 15 Vict. c. cxix.), s. 15: "If any street or part of a street (not being a highway repairable by the inhabitants at large) which now is or shall at any time hereafter be formed or set out within the borough shall not be sufficiently sewered and drained, levelled, flagged, and paved, to the satisfaction of the council, it shall be lawful for the council, at any time and from time to time after the passing of this Act, by any writing under the hand of the town clerk, to order that any such street or part thereof shall be freed from obstruction, and sewered and drained, levelled, flagged, and paved, or otherwise completed, in such manner and within such time as the council shall order

1879

MIDGLEY v. COPPOCK.

and drained, and a part of the sum due in respect of the houses, amounting to 70*l.* 7*s.* 5*d.*, remained unpaid. Upon the 28th of April, 1877, Rushton contracted to sell the houses, to the

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and direct; and thereupon the respective owners of the houses and ground lying alongside or adjoining to the said street, notwithstanding any parts of such street may include, pass over, lie opposite, or be adjacent to any cross or other street or any part thereof, shall within such time and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer and drain, level, flag, and pave, or otherwise complete, such streets respectively."

Sect. 17: "If any such owners shall neglect or omit to remove the obstructions, and sewer, drain, level, flag, and pave, or otherwise complete such street or any part of such street within such time and in such manner as expressed in the said order, it shall then be lawful for the council to remove all obstructions, and to sewer, drain, level, flag, and pave, or otherwise to complete, as they shall think fit, the said street or such part thereof as shall not have been done pursuant to the said order, and to charge such respective owners with their several proportional parts of the charges and expenses thereof or which are incidental thereto, according to the extent of their respective houses and grounds lying alongside or adjoining to the said street, such share and proportion to be ascertained and settled by or under the direction of the said council; and all the charges and expenses which the council shall thereby sustain, incur, or pay, and shall so charge upon such owners respectively, shall, on demand, be forthwith paid and refunded to the council by such owners respectively, and, together with interest from and after the expiration of three calendar months from the date when the completion of the street shall . . . . be certified by the council, shall be recoverable by action of debt in any court of competent jurisdiction."

Sect. 18: "By way of additional remedy it shall be lawful for the council, whether any such demand shall have been made upon such owner or not, to require the payment of all or any part of such charges and expenses from the person, who shall then or at any time thereafter occupy any such houses or ground; and in default of payment thereof by such occupier, on demand by the council, the same may be levied by distress, and any justice may issue his warrant accordingly; and the owner shall allow every such occupier to deduct all sums of money which he shall so pay, or which shall be levied by distress, out of the rent from time to time becoming due in respect of the said houses or ground, as if the same had been actually paid to such owner as part of such rent."

Sect. 19: "In no case, except as hereinafter mentioned, shall any occupier be liable to pay more money in respect of such charges and expenses as aforesaid than the amount of rent due from him at the time of the demand made upon him for such charges and expenses, in case he shall pay the same or any part thereof, on demand, or at the time of the issuing the warrant of distress, or the levying thereof, in case such charges and expenses, or any part thereof, shall be levied by distress: Provided nevertheless, that if any occupier shall pay any rent to his landlord, after notice from the council delivered

defendant, but no conveyance to him was executed. The defendant having sold his right to the houses by the contract of the 29th of June above-mentioned, the conveyance to the plaintiffs was executed upon the 7th of August. The plaintiffs and the defendant at the time of both the contract and the completion were ignorant that any claim existed in respect of improving the street in which the houses stood. Afterwards the corporation of Manchester demanded payment of 70*l.* 7*s.* 5*d.*, which, together with 11*s.* 10*d.* for interest, was discharged by the plaintiffs. They now sought to recover these sums from the defendant.

Lopes, J., gave judgment for the defendant upon the ground, that the words, as to apportionment at the end of the clause, shewed that it was intended to extend only to such charges as were capable of being apportioned.

The plaintiffs appealed.

Edwards, Q.C., for the plaintiffs. The defendant agreed in express terms that he would discharge all "outgoings" becoming due before the completion of the purchase. The word "outgoing" has a very extended meaning, and is wide enough to include the charge for improving the street, which had existed ever since the year 1873.

Gorst, Q.C., and *J. F. Leese*, for the defendant. The expense of improving the street is a charge upon the person and not upon the property: it is a penalty imposed upon the owner for the time being: *Tidswell* v. *Whitworth*. (1) The work was done by

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to him personally, or left with some inmate at the place of his occupation as aforesaid, requiring him not so to do, such occupier shall be liable to pay in respect of such charges and expenses the amount of the rent so paid by him after such notice, or the same may be recovered from him by warrant of distress as aforesaid; and after any such notice shall have been delivered or left as aforesaid, it shall not be lawful for the landlord of the premises to which such notice applies to commence or prosecute any action at law for the recovery of rent for such premises until the charges and expenses on account of which such notice shall have been given shall be paid."

By the interpretation clause (s. 144), "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, or who would receive the same if such lands or premises were let at a rack-rent."

(1) Law Rep. 2 C. P. 326.

1879

MIDGLEY v. COPPOCK.

the corporation of Manchester in 1873, when neither the plaintiffs nor the defendant were owners.

[BRAMWELL, L.J. *Tidswell* v. *Whitworth* (1) seems a clear case: the landlord was bound to level, sewer, and pave the street: this he failed to do, and then he wished to make his tenant liable for the consequences of his own default.

BRETT, L.J. The argument for the present defendant comes to this, that the plaintiffs were ill-advised to pay the amount claimed by the corporation.]

It is unnecessary to argue that the payment by the plaintiffs was voluntary: but at all events the defendant is not liable to the charge: the corporation had no remedy against the defendant. *Tidswell* v. *Whitworth* (1) is approved of and distinguished in *Thompson* v. *Lapworth*. (2) At all events, a sum equal to the rent of the houses during three months is all that the plaintiffs can recover from the defendant; for he was owner of them only during that period, and the plaintiffs are entitled merely to that sum, which he might have been compelled to pay. But, further, in any point of view, the expense of improving the street ceased to be an "outgoing" within the meaning of the contract of sale after the conveyance to the plaintiffs had been executed: their claim is really for compensation in respect of a diminution in the value of the hereditaments bought by them: but in the absence of fraud no compensation can be had after the purchase has been completed: *Manson* v. *Thacker*. (3)

[LORD COLERIDGE, C.J. *Manson* v. *Thacker* (3) is clearly distinguishable. The compensation there claimed was in respect of an alleged error or mis-statement in the particulars of sale: here the defendant expressly agreed to discharge all demands existing before the completion of the purchase, and the work was done some years before the contract of sale was entered into.]

Edwards, Q.C., was not called upon to reply.

LORD COLERIDGE, C.J. This is an appeal by the plaintiffs from a decision of Lopes, J., in favour of the defendant. The action was brought upon an agreement for the sale of certain heredita-

(1) Law Rep. 2 C. P. 326. (2) Law Rep. 3 C. P. 149.
(3) 7 Ch. D. 620.

ments, which contained a clause providing that all rates, taxes, and outgoings should be discharged by the vendor. The plaintiffs claimed a little more than 70*l.*, being the remainder of a certain sum said to be due, and, in fact, paid to the corporation of Manchester for improving the street in which the houses were standing. The plaintiffs, who had bought the houses of the defendant, were called upon to discharge the balance of a sum which the contract of sale did not state to be due. The question is whether the defendant is bound to repay that sum to the plaintiffs, who were compelled to liquidate it by virtue of the Act for the improvement of Manchester. We need not discuss all the sections which have been cited; but this at least is clear, that when the property subject to the charge is occupied by a tenant, that tenant can be made pay by the process contained in the section: that is to say, by successive distresses levied from time to time, he can be prevented from paying the rent to the landlord. I say nothing as to whether successive owners can be compelled to pay directly, and in their own persons, but they can be forced to pay through the pressure which can be put upon their tenants. If I am right in this view, the charge upon the hereditaments bought by the plaintiffs was clearly an "outgoing" recoverable from a tenant. All "outgoings" of this kind the vendor was by the contract of sale bound to discharge, and as he failed to fulfil his contract, he is liable to reimburse the purchasers, who are the present plaintiffs. The ground upon which Lopes, J., decided the present action has not been much argued before us. The learned judge based his judgment upon the words, "such rents and outgoings being apportioned if necessary." He was of opinion that these words shewed that the only "outgoings" to be discharged by the vendor were such as from their very nature were capable of being apportioned, and that the charge for improving the street, being incapable of apportionment was not an "outgoing" within the meaning of the clause. If the words "if necessary" had been left out of the clause in the contract there would have been great force in his view: but the effect of these words was in some degree overlooked by the learned judge. Some taxes, such as the property-tax, and some rates, such as the poor-rate, are apportionable, and accordingly would be apportioned under the clause: but the

1879

MIDGLEY v. COPPOCK.

words, "if necessary," shew that it extends to "outgoings" which need not and cannot be apportioned. The charge for improving the street cannot be apportioned, and the defendant has not discharged it. I may add that I do not desire to say a single word in derogation of *Tidswell* v. *Whitworth*. (1) It was a case of landlord and tenant, and not of successive owners; the relation of vendor and purchaser was not present to the minds of the judges.

BRAMWELL, L.J. I am of the same opinion, and for the same reasons. Our judgment is not at all inconsistent with *Tidswell* v. *Whitworth* (1): there the landlord could not make the tenant pay for his own default. In *Manson* v. *Thacker* (2) the agreement relied on was for compensation in respect of any error or misstatement in the particulars of sale. In the action before us the plaintiffs rely upon an express contract by the defendant to discharge the amount, which they have been compelled to pay.

BRETT, L.J. I concur, and have only to add that the reasons assigned by Lord Coleridge are to be taken as the grounds of the decision of this Court.

Judgment reversed.

Solicitors for plaintiffs: *Pitman & Lane, for J. E. & R. Whitworth, Manchester.*

Solicitors for defendant: *Sewell & Edwards, for F. J Marlow, Manchester.*

(1) Law Rep. 2 C. P. 326.

(2) 7 Ch. D. 620.

COBBOLD AND OTHERS *v.* PRYKE (ADMINISTRATRIX). 1879 July 12.

Practice—Administration Suit in County Court—Staying Actions in High Court—County Court Act, 1865 (28 & 29 *Vict. c.* 99), *s.* 1—*County Court Rules*, 1875, *Order II.—Judicature Act*, 1873, *s.* 24, *sub-s.* 5, *ss.* 89, 91.

Since the Judicature Act, 1873, a county court before which an administration suit is pending has no power to stay proceedings in the High Court, in respect of claims proveable in the administration suit.

MOTION for a rule calling on the county court judge of Suffolk to shew cause why a writ of prohibition should not issue, prohibiting him from maintaining and enforcing an order made by him under the following circumstances.

This action was commenced in the Exchequer Division of the High Court against the defendant as administrator of one Pryke, deceased. Subsequently proceedings were commenced in the county court at the suit of a creditor to administer the estate of the deceased, and a receiver was appointed. The county court judge made an order by way of injunction, restraining all further proceedings in the action in the Exchequer Division. This was the order complained of.

Poyser, for the plaintiff, in asking for a rule, pointed out that by the County Court Equitable Jurisdiction Act, 1865 (28 & 29 Vict. c. 99), s. 1, the county court had the power and authority of the High Court of Chancery, in all suits or matters therein mentioned, among which are suits by creditors and others for the administration of estates not exceeding 500*l*. Under this section the county court would have had power, before the Judicature Acts, to issue a restraining order, but that power is taken away by the Judicature Act, 1873, s. 24, sub-s. 5, since the Chancery Division could not now issue such an order, and the power of the county court is the same now as that of the Chancery Division.

Malden, for the receiver, shewed cause in the first instance, and contended that the county court judge had properly made the order, on the ground that the change of jurisdiction introduced by the Judicature Acts was not intended to affect county court procedure, except where expressly mentioned.

Poyser, was heard in reply.

1879

COBBOLD v. PEYKE.

LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. I think it clear that the jurisdiction to make the order which the county court judge made is now gone. The jurisdiction conferred by the County Court Act, 1865, so far as it relates to this case, was that county courts should have and exercise all the power and authority of the High Court of Chancery, in all administration suits where the sum involved does not exceed 500*l*. The Judicature Act, 1873, by s. 24, sub-s. 5, in terms directs that no cause pending in the High Court of Justice shall be restrained by prohibition or injunction. I agree that this would not in itself be conclusive of the matter, because as was pointed out in the course of the argument that appears to relate to proceedings within the Supreme Court of Judicature itself. It seems to me, however, that the jurisdiction conferred by the County Court Act, 1865, being that exercised by the High Court of Chancery, when this is taken away, the power of the Court which is to represent or stand in the place of the High Court of Chancery, and have and exercise the same power, is taken away also. Any doubt, however, is removed, when we look at s. 89 of the Judicature Act, because that section provides that an inferior Court, having jurisdiction in equity, shall grant relief in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice, and s. 91 applies the rules of law enacted by the Act to inferior Courts. Since then there is now by the Judicature Act no jurisdiction in the Chancery Division to make such an order as that appealed against, the power is taken away from the county court.

FIELD, J., concurred.

Order absolute for prohibition.

Solicitors for plaintiff: *Rhodes & Son, for Cobbold, Sons, and Rouse, Ipswich.*

Solicitors for receiver: *Baylis & Pearce, for S. Gooding, Ipswich.*

[IN THE COURT OF APPEAL.]

1879
Aug. 6.

SHELFORD *v.* THE LOUTH AND EAST COAST RAILWAY COMPANY.

Practice—Order XIV., Rule 1—Writ specially Indorsed—Corporation Defendants.

Where a writ is specially indorsed under Order III., rule 6, the plaintiff may apply for judgment under Order XIV., rule 1, though the defendants are a corporation.

THIS was an action in the Exchequer Division for services rendered by the plaintiff as engineer to the defendant company. The writ was specially indorsed under Order III., rule 6 with a claim for 2616*l.* 3*s.* 7*d.*, and interest on 2242*l.* 5*s.* 6*d.*, part of that sum, from the 31st of December, 1877, until payment, and 2*l.* 10*s.* for costs. The writ was issued on the 16th of June, 1879, and statement of claim delivered on the 3rd of July. On the same 3rd of July the plaintiff applied under Order XIV., rule 1, for leave to sign final judgment against the company. Master Pollock, without entering upon the merits, dismissed the application, on the ground that Order XIV., rule 1, did not apply where the defendant was a company. On the 5th of July a summons by way of appeal was taken out to review that decision. This summons was heard by Field, J., who, as it was stated, agreed in opinion with Master Pollock, but offered, if the plaintiff wished it, to refer the case to a Divisional Court. This was done, and a notice of appeal was accordingly given. On the 14th of July the Divisional Court (Lord Coleridge, C.J., and Field, J.) reversed the order of Master Pollock, and directed that the cause should be referred back to the master on the merits. This was done on the authority of *Muirhead* v. *Direct United States Cable Co.* (1) The company appealed from this decision.

Horne Payne, for the appellants. Order XIV., rule 1, does not apply where the defendant is a corporation, since a corporation cannot make an affidavit. The affidavit on the part of the plaintiff, as the rules originally stood, had to be made by the plaintiff

(1) 27 W. R. 708.

1879

SHELFORD v. LOUTH AND EAST COAST RAILWAY CO.

himself, and therefore it was held that a corporation could not apply: *Bank of Montreal* v. *Cameron*. (1) The original rule was altered by the order of May, 1877, as regards the plaintiff, but it has not been altered as regards a defendant. Rule 3 explains rule 1, and shews that the affidavit must be made by the defendant himself, the plaintiff therefore cannot have the benefit of this mode of proceeding against a corporation which cannot make one.

Moulton, contrà. The fact that the old rule did not apply to a plaintiff corporation, and that it was therefore thought right to alter it, does not affect the case. Rule 1, if fairly read, is clear as regards a defendant, he may satisfy the Court "by affidavit or otherwise."

[COTTON, L.J. I should feel no difficulty on rule 1 if it stood alone, but does not rule 3 interpret rule 1, and shew that the defendant must either make an affidavit or bring the money into Court?]

There is not enough in that rule to alter the meaning of rule 1, which clearly imports that the plaintiff is to have judgment, unless the judge is satisfied by sufficient evidence that on the merits the defendant ought to be allowed to defend.

Horne Payne, in reply.

JAMES, L.J. In my opinion the Court which decided on the meaning of rule 1 as it originally stood, was right in saying that with regret it was obliged to come to the conclusion that the words were such as to deprive a plaintiff corporation of a right enjoyed by other plaintiffs. By the alteration it was made clear that a corporation as plaintiff was to be on the same footing as other plaintiffs. It would be a singular state of things if a corporation when a plaintiff is to have the benefit of this rule, but is not to bear the burden of it when it is a defendant. Taking rule 1 by itself I cannot bring myself to doubt that the decision appealed from is clearly right. The Court or a judge may do certain things "unless the defendant by affidavit or otherwise" satisfies the Court or judge that he ought to be allowed to defend. The grammatical meaning of the words is that the defendant may

(1) 2 Q. B. D. 536.

satisfy the Court or judge by affidavit or by any other sufficient means. If "by affidavit" means "by the affidavit of the party defending" then "or otherwise" must mean "by some other means than the affidavit of the defendant." The substance of the rule is, that by the affidavit of the defendant, or in some other way, the facts must be brought before the judge so as to satisfy him. This appears to be the plain meaning of the rule taken by itself. Is this altered by rule 3? and does that rule compel us to read "or otherwise" in some non-natural sense? It would be unreasonable to give the subsequent rule such an effect on the main enactment. The only object of the words "in such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and to what part, of the plaintiff's claim" was to provide that the defendant must make it appear whether he was disputing the whole or part only of the plaintiff's claim, and it would not, in my opinion, be a legitimate construction to hold that they restrict the meaning of the 1st rule, so as to make "by affidavit or otherwise" mean "by affidavit made by himself or by payment of money into court." I am of opinion that Lord Coleridge, C.J., and Field, J., came to a correct conclusion, and that any evidence which satisfies the Court or judge is sufficient within the meaning of the rule, and that there is no reason for excluding from its operation a case where the defendant is a corporation.

COTTON, L.J. I said during the argument, and I adhere to the remark, that if rule 1 had stood alone I should have felt no doubt in the case. According to the plain terms of that rule the Court is not to make the order, if the defendant by affidavit or otherwise satisfies the Court of certain things. We cannot reject the words "or otherwise," they must mean by any other evidence to which the Court can look; and they can hardly be satisfied by referring them to payment into Court, since such payment cannot satisfy the Court that there is a defence on the merits. If, then, the words "by affidavit" are confined to an affidavit by the defendant, the words "or otherwise" must let in other evidence. I think, therefore, that the Court is not confined to an affidavit by the defendant himself, though an affidavit by the defendant ought

1879

SHELFORD v. LOUTH AND EAST COAST RAILWAY CO.

not to be dispensed with where he is a person who can make an affidavit. We, however, are dealing with a case where the defendant cannot make an affidavit. Even apart from the words "or otherwise" I am not satisfied that the words "by affidavit" ought to be confined to an affidavit by the defendant himself. In the *Bank of Montreal* v. *Cameron* (1) the Court was dealing with very different words—"The plaintiff may on affidavit verifying the cause of action and swearing that in his belief there is no defence to the action." It was, I think, rightly held that an affidavit of the plaintiff's belief must be an affidavit made by himself. In my opinion, therefore, that case is no authority for holding that, apart from the words "or otherwise," the affidavit on the part of the defendant must necessarily be made by himself.

As regards rule 3, though it might have been sufficient to confine the affidavit mentioned in rule 1 to an affidavit by the defendant himself, if the words "or otherwise" had not been found there, I agree that it is insufficient to confine the meaning of those words.

Appeal dismissed.

Solicitors for plaintiff: *Brooksbank & Galland.*
Solicitor for defendants: *W. R. A. Kime.*

(1) 2 Q. B. D. 536.

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In the First Series,
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1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

ADMINISTRATION—Suit in county court—Stay of proceedings in High Court - 315
See PRACTICE. 1.

ALLOTMENT—Of shares—Letter posted, but not received - - - - 216
See COMPANY. 1.

APPEAL—Supreme Court—Misdirection - 32
See PRACTICE. 2.

—— By motion from inferior court—Time for entering appeal - - - 148
See PRACTICE. 4.

—— Time—Order at chambers during long vacation - - - C. A. 150
See PRACTICE. 3.

APPORTIONMENT—Of rent—Assignee assigning over - - - - 94
See LANDLORD AND TENANT. 1.

ARBITRATION—Award—Costs—County Courts Act, 1867 - - - - 249
See PRACTICE. 9.

ATTACHMENT OF DEBTS—*Garnishee—Common Law Procedure Act*, 1854, *s.* 61—*Interest on Railway Stock guaranteed by Garnishee.*] The defendants raised money by the issue of capital stock to complete a portion of their line. By an arrangment between the defendants and the D. Railway Company, confirmed by an Act of Parliament, the line was worked by the latter company, who provided and paid to the defendants half-yearly a sum of money for the payment of interest on the stock. Judgment having been recovered by the plaintiff against the defendants and one of the half-yearly instalments being due:—*Held*, that it could be attached in the hands of the D. Railway Company as a debt under the Common Law Procedure Act, 1854, s. 61. BOUCH *v.* SEVENOAKS RAILWAY COMPANY [133

BANKRUPTCY—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 49—*Order of Discharge—Promise for Valuable Consideration to pay Debt released by discharge.*] Where a debtor, after having obtained an order of discharge under the Bankruptcy Act, 1869, promises, for a new and valuable

BANKRUPTCY—*continued.*

consideration, to pay a debt which by virtue of s. 49 has been released by the discharge, an action lies against him for the amount of the debt.—*Heather* v. *Webb* (2 C. P. D. 1) distinguished. JAKEMAN *v.* COOK - - - - 26

—— Churchwarden of metropolitan parish—Penalty for acting as member of vestry [307
See METROPOLIS MANAGEMENT ACTS. 1.

BILL OF SALE—*Inventory of Goods with Receipt attached—Receipt of Sheriff's Officer for Purchase-money of Goods sold under Execution—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.] A judgment debtor's household furniture having been seized at his house under a fi. fa., the debtor's father-in-law bought them from the sheriff's officer, and took his receipt for the purchase-money. The receipt contained an inventory of the furniture. On the same day the purchaser let the house and furniture to the debtor at a rent under a written agreement, and the debtor continued in possession of the house and furniture:—*Held*, that the receipt did not require registration as a bill of sale under 17 & 18 Vict. c. 36, ss. 1, 7; since the sale was by the sheriff's officer an absolute one, and the receipt was not the medium of transfer, but only evidence of payment. WOODGATE *v.* GODFREY 59

CARRIER—Railway—Deposit by season ticket holder under contract—Forfeiture 88
See RAILWAY COMPANY. 2.

CASES: *British and American Telegraph Company* v. *Colson* (Law Rep. 6 Ex. 108) overruled - - - - - 216
See COMPANY. 1.

—— *Clegg* v. *Rowland* (Law Rep. 3 Eq. 368) commented upon and approved - 256
See PRACTICE. 14.

—— *Croomes* v. *Gore* (1 H. & N. 14) followed 1
See PRACTICE. 8.

—— *Great Western Railway Company* v. *Bishop* (Law Rep. 7 Q. B. 550) considered 302
See LOCAL GOVERNMENT ACTS.

CASES—*continued.*
—— *Heather* v. *Webb* (2 C. P. D. 1) distinguished *See* BANKRUPTCY. [26
—— *Langridge* v. *Campbell* (2 Ex. D. 281) discussed - - - - 174
See PRACTICE. 5.
—— *Moone* v. *Rose* (Law Rep. 4 Q. B. 486) distinguished - - - - 73
See GAOLER.
—— *Moore* v. *Watson* (Law Rep. 2 C. P. 314) doubted - - - - 249
See PRACTICE. 9.
—— *Moss* v. *Sweet* (16 Q. B. 493; 20 L. J. (Q.B.) 167) commented on - - 279
See PRACTICE. 16.
—— *Yetts* v. *Foster* (3 C. P. D. 437) followed 32
See PRACTICE. 2.
CATTLE—Injury to, from poisonous tree on adjoining land - - - - 5
See NUISANCE.
CHAMBERS—Order during long vacation—Time for appealing - - - 150
See PRACTICE. 3.
CHARTERPARTY.
See Cases under SHIP.
CHURCHWARDEN—Of metropolitan parish—How far member of vestry—Bankruptcy [307
See METROPOLIS MANAGEMENT ACTS. 1.
COAL MINE - - - - - - 13
See MINE.
COMPANY—*Allotment of Shares—Letter of Allotment posted, but not received—Post Office, Agent of Parties contracting by Letter.*] The defendant applied for shares in the plaintiffs' company. The company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:—*Held*, by Baggallay and Thesiger, L.JJ., Bramwell, L.JJ., dissenting, that the defendant was a shareholder.—*British and American Telegraph Co.* v. *Colson* (L. R. 6 Ex. 108) overruled. HOUSEHOLD FIRE INSURANCE COMPANY *v.* GRANT - - C. A. 216
2. —— *Shares—Sale of—Dividends declared between Contract for Sale and Completion.*] Shares of a company were sold by auction on the 1st of August, and a deposit was paid. By the conditions of sale, the purchase was to be completed on the 29th of August, which accordingly was done and the transfers signed. The conditions of sale were silent as to dividends, and, in the meanwhile, on the 24th of August, a dividend was declared in respect of a period antecedent to the sale by auction:—*Held*, that the dividend belonged to the purchaser. BLACK *v.* HOMERSHAM [24
CONSERVATORS—Of river—Action for obstruction of waterway - - - 116
See RIVER.
CONTEMPT—Discharge of prisoner in custody for—Detention for more than one year 73
See GAOLER.
CONTRACT—Not to be performed within one year - - - - - 81
See FRAUDS, STATUTE OF.
CONVERSION—Measure of damages - 188
See DAMAGES.
CORPORATION—Defendants—Judgment under Order XIV., Rule 1 - - 317
See PRACTICE. 17.
COSTS—Action for more than 50*l.*—Balance recovered on claim and counter-claim
See PRACTICE. 6. [286, 301
—— Application to deprive successful party of costs—Divisional Court - - 176
See PRACTICE. 7.
—— Before and after payment into court 174
See PRACTICE. 5.
—— Taxation—Copies of shorthand writers' notes for use of counsel - - 1
See PRACTICE. 8.
—— *See* Cases under PRACTICE, COSTS.
COUNTER-CLAIM AND SET-OFF—Action for more than 50*l.*—Balance recovered on claim and counter-claim - 286, 301
See PRACTICE. 6.
COUNTY COURT—*Sending Case to County Court—Claim indorsed on Writ—Condition as to Costs of Trial—County Court Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 7.] A claim indorsed on a writ of "50*l.* and interest at the rate of 5*l.* per cent. per annum from the date hereof until payment or judgment," is a claim exceeding 50*l.* within the meaning of the County Court Act, 1867, s. 7, and the action cannot be sent to a county court under that section.—On an application at chambers, in such a case, to send the action to the county court, there is no power to impose a condition as to the costs of the trial in the superior Court. INSLEY *v.* JONES - - - - 16
—— Action remitted—New trial - - 215
See PRACTICE. 15.
—— Administration suit in—Stay of proceedings in High Court - - - 315
See PRACTICE. 1.
CRIMINAL LAW—*Extradition—Warrant—Sufficiency of Description of Offence—"Crimes against Bankruptcy Law"—Extradition Acts*, 1870 (33 & 34 *Vict. c.* 52), *s.* 8, *and Schedule, and* 1873 (36 & 37 *Vict. c.* 60), *s.* 1, *and Schedule.*] By the Extradition Acts, 1870 and 1873, indictable offences under the laws for the time being in force in relation to bankruptcy may be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted, were "crimes against bankruptcy law." A warrant for the apprehension of a fugitive criminal by virtue of such treaty described the offence as "the commission of crimes against bankruptcy law" within the jurisdiction of the foreign power demanding the extradition:—*Held*, that the description was sufficient, and that the warrant was good. *Ex parte* TERRAZ - 63
CROWN—Right of Crown to injunction to restrain action - - - - 173
See PRACTICE. 11.

DAMAGES—*Measure of—Conversion.*] The defendants, as warehousemen, held for the plaintiffs corn belonging to them. G., an agent of the plaintiffs, obtained sixty quarters from the defend-

DAMAGES—*continued.*
ants, promising to forward them a delivery order from the plaintiffs. T. subsequently contracted to purchase sixty quarters of corn from the plaintiffs, and having obtained from the plaintiffs a delivery order to himself, endorsed it to G. who forwarded it to the defendants as the delivery order which he had promised to send to them. T. was unable to pay for the corn, and G. never accounted to the plaintiffs for the price of the sixty quarters of corn which G. had obtained:—*Held* (overruling the Exchequer Division), by Bramwell and Thesiger, L.JJ., that although there had been a conversion of the sixty quarters of corn by the defendants, the plaintiffs were entitled to only nominal damages.—By Baggallay, L.J., that plantiffs had not been damnified, and were not entitled to any damages. HIORT *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY [188

DEBTOR'S SUMMONS—Application for judgment under Order XIV., after debtor's summons for same debt - - 279
See PRACTICE. 16.

DEMURRAGE—Arrival of ship at place of loading
See SHIP. 1. [265

DEPOSIT—By season ticket-holder—Forfeiture
See RAILWAY. 2. [88

DISCOVERY—Practice. 3, 49
See PRACTICE. 12, 13.

DIVIDEND—On shares—Dividend declared after sale but before completion of purchase—Right of purchaser - - 24
See COMPANY. 2.

EXECUTOR—Non-joinder of - - 256
See PRACTICE. 14.

EXTRADITION — Description of offence in warrant - - - - 63
See CRIMINAL LAW.

FRAUDS, STATUTE OF—s. 4—*Contract not to be performed within a Year.*] The statement of claim alleged that in 1866, the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within five miles of D.; and that on the expiration of the three years he continued in the plaintiff's employment on the like terms (except as to the period of employment) till 1877. Breach that in 1877, the defendant left the plaintiff, and carried on business as a tailor in D. The statement of defence alleged that the contract was not in writing as required by the Statute of Frauds:—*Held*, on demurrer, by Hawkins, J., that the contract amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff; and was therefore primâ facie not to be performed within a year, and therefore fell within s. 4 of the Statute of Frauds. DAVEY *v.* SHANNON - - - - - 81

GAOLER—*Discharge of Prisoner in Custody for Contempt—Default by Solicitor in payment of*

GAOLER—*continued.*
Sum of Money as Officer of Court—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.] The Debtors Act, 1869, s. 4, enacts that "no person shall be arrested or imprisoned for making default in payment of a sum of money," except (inter alia) in case of "default by an attorney or solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order," and provides that "no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year."—In an action in which the present plaintiff acted as solicitor and improperly signed judgment and issued execution and received the amount of the levy, an order was made on him to bring that amount into court, and on his non-compliance an order of attachment was made under which he was arrested and committed to the custody of the defendant. The order was to attach the plaintiff so as to have him before the Common Pleas Division of the High Court of Justice to answer touching an alleged contempt, but the order did not shew what the contempt was. The plaintiff was kept in custody for more than a year, and then applied for and obtained his discharge under a judge's order. In an action by him against the defendant for detaining him beyond the year:—*Held*, that whether the Debtors Act, 1869, applied or not, the defendant having complied with the order was not liable to an action, but was protected by the exigency of the writ.—*Moone* v. *Rose* (Law Rep. 4 Q. B. 486), distinguished. GREAVES *v.* KEENE - - 73

GARNISHEE—Guarantee of interest upon railway stock - - - - 133
See ATTACHMENT OF DEBTS.

HOUSE—Inhabited house duty—Building used partly as club and partly as auctioneer's office - - - - - 100
See REVENUE. 1.

INCOME TAX - - - - - 97
See REVENUE. 2.

INFERIOR COURT—Appeal by motion—Time for entering appeal - - - 148
See PRACTICE. 4.

INHABITED HOUSE DUTY — Building used partly as club and partly as auctioneer's office - - - - - 100
See REVENUE. 1.

INJUNCTION—Right of Crown to restrain action
See PRACTICE. 11. [172

—— Right of mortgagee to enforce covenant in respect of mortgaged premises without joining mortgagor - - - 37
See MORTGAGE.

JUDGMENT—Obtained by collusion - 107
See SUNDAY OBSERVANCE.

LANDLORD AND TENANT—*Assignee assigning over—Apportionment of Rent—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 3, 4.] The residue of a term under a lease having become

LANDLORD AND TENANT—*continued.*

vested in the trustee of the lessee, who was a liquidating debtor, the trustee assigned over during a current quarter. In an action, brought after the expiration of the quarter against the trustee by the lessor, to recover a proportionate part of the quarter's rent up to the time of the assignment over by him:—*Held*, that the Apportionment Act, 1870, applied, and that the lessor was entitled to recover. SWANSEA BANK *v.* THOMAS - - - - - - 94

2. —— *Notice to Quit.*] The defendant was tenant to the plaintiff from year to year of a shop and premises; the plaintiff gave the defendant notice in writing to quit on a day terminating the tenancy. The notice contained the following clause: "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance":—*Held*, by Bramwell and Cotton, L.JJ., Brett, L.J., dissenting, that the notice to quit being otherwise sufficient, it was not rendered invalid by the additional clause. AHEARN *v.* BELLMAN. SEDGWICK *v.* AHEARN - - - C. A. 201

LETTER—Contract by—Letter of allotment posted but not received - - - 216
See COMPANY. 1.

LIGHTERS—Delay in unloading vessel through deficiency in - - 155, 165
See SHIP. 2, 3.

LITERARY AND SCIENTIFIC INSTITUTION—Bequest to - - - - 54
See WILL.

LOCAL GOVERNMENT ACTS—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55)—*Offensive Trades—Effluvia a Nuisance or injurious to Health.*] The case of an offensive trade causing effluvia is within s. 114 of the Public Health Act, 1875, if the effluvia, though not injurious to persons in sound health, cause sick persons to become worse.—Per STEPHEN, J.: It is not necessary, to constitute an offence under that section, that such effluvia, if they amount to a nuisance, should also be injurious to health.—*Great Western Ry. Co.* v. *Bishop* (Law Rep. 7 Q. B. 550) considered. MALTON LOCAL BOARD OF HEALTH *v.* MALTON MANURE COMPANY [302

MEASURE—Of damages—Conversion - 188
See DAMAGES.

METROPOLIS MANAGEMENT ACTS (18 & 19 *Vict. c.* 120), *ss.* 2, 54—*Vestry—Member becoming Bankrupt—Churchwarden.*] A churchwarden of a parish named in Schedule B of the Metropolis Local Management Act, 1855, is a member of the vestry of that parish within the meaning of s. 64, and is liable to a penalty if, after becoming bankrupt, he acts as a member of such vestry. LEFTLY *v.* MONNINGTON - - - 307

2. —— (25 & 26 *Vict. c.* 102), *s.* 77—*Paving New Street—Land bounding or abutting on New Street — Railway in Cutting — Bridge carrying New Street over Railway—New Street.*] A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over on a bridge from one boundary of the line to the other, but supported on stone piers erected on the slope of the cutting. On an information under s. 77 of the Metropolis Management Amendment Act, 1862, against the railway company for not contributing to the paving of the road:—*Held*, that the line and the slopes of the cutting did not bound or abut upon the road within the meaning of the Act.—The line of houses adjoining the road terminated at the east end of the bridge, while after crossing the bridge there was but one cottage, and the roadway ceased to be a public thoroughfare, being closed by a private gate. A small portion of the slope of the cutting abutted on the road, between the west end of the bridge and the private gate:—*Held*, that the railway company were not liable to contribute to the paving of the road, as it ceased at the eastern extremity of the bridge to be a "new street" within the meaning of the Act. BRIGHTON RAILWAY COMPANY *v.* ST. GILES, CAMBERWELL - 239

MINE—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 18 — *Check-weigher — Removal.*] The appellant, who was a miner in the respondent's coal mine, was appointed check-weigher by the other miners under the provisions of s. 18 of the Coal Mines Regulation Act, 1872, and acted in that capacity, and was paid by the miners. Subsequently the respondents dismissed all the miners and closed the mine. No notice was given to the appellant by the respondents, or by or on behalf of the miners. On the mine being reopened a short time afterwards, the appellant claimed to be still check-weigher and to be entitled to perform the duties of that office, and brought an action against the respondents for preventing his doing so:—*Held*, that the appellant had, on the dismissal of the miners, ceased to be check-weigher, and that the action could not be maintained. WHITEHEAD *v.* HOLDSWORTH - - 13

—— Income tax—Slate obtained by underground workings - - - - 97
See REVENUE. 2.

MISDIRECTION—Appeal - - - 32
See PRACTICE. 2.

MORTGAGE — *Parties — Covenant not to open House as a Beer-house—Injunction—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5.] A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee.—F., being owner of copyhold land, covenanted with S. to stand seised thereof in trust for him and his heirs, subject to a rent, and subject to a covenant by S. not to use any building erected thereon as a beer-house. All the estate of S. vested in the defendant. F. sold the land to the plaintiff, B. advancing the purchase-money, and it was conveyed to B., subject to a proviso for conveyance to the plaintiff upon payment to him by B. of the amount advanced. The defendant used the building erected upon the land as a beer-house:—*Held*, that upon the general principles of equity, the plaintiff was entitled to restrain the defendant by injunction

MORTGAGE—*continued.*
from using the building for that purpose without joining B.—*Quære*, whether the Judicature Act, 1873, s. 25, sub-s. 5, would have entitled the plaintiff to an injunction in his own name. FAIRCLOUGH *v.* MARSHALL - - - C. A. 37

MORTGAGE—Transfer or assignment of - 270
See REVENUE. 3.

NEGLIGENCE — Liability of conservators of rivers - - - - 116
See RIVER.

NEW TRIAL—Action remitted to county court
See PRACTICE. 15. [215

—— Application for - - - 32, 215
See PRACTICE. 2, 15.

NOTICE TO QUIT—Claim of additional rent if tenant remains in possession - 201
See LANDLORD AND TENANT. 2.

NUISANCE—*Injury to Cattle—Protection of Poisonous Trees over Neighbour's Land—Maxim, "Sic utere tuo ut alienum non lædas."*] The defendants, a burial board, planted on their own land and about four feet distant from their boundary railings a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow, which was hired by the plaintiff for pasture. The plaintiff's horse, feeding in the meadow, ate of that portion of the yew tree which projected over the meadow, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants. The plaintiff having brought an action for the value of the horse:—*Held*, that the defendants were liable on the principle of the maxim, "Sic utere tuo ut alienum non lædas." CROWHURST *v.* AMERSHAM BURIAL BOARD - - - 5

—— Injurious to health - - - 302
See LOCAL GOVERNMENT ACTS.

PAVING—New street under Metropolis Management Act - - - - 239
See METROPOLIS MANAGEMENT ACTS. 2.

PAYMENT INTO COURT—Costs of action before and after payment into Court—Discretion - - - - - 174
See PRACTICE. 5.

PERPETUITY—Gift to building fund - 54
See WILL.

PENALTY—Action for—Judgment by collusion
See SUNDAY OBSERVANCE. [107

PETITION OF RIGHT—*Petitions of Right Act*, 1860 (23 & 24 *Vict. c.* 34), *s.* 7—*Practice—Procedure—Production of Documents—Rules of Supreme Court, Order XXXI., rule* 12—*Application by Crown against Suppliant for Discovery.*] In a petition of right the Crown is entitled as against the suppliant to an order for the discovery of documents, by the combined effect of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, and the Rules of the Supreme Court, Order XXXI., rule 12. TOMLINE *v.* THE QUEEN - C. A. 252

PIER COMPANY—*Toll—Notice of Rate authorized to be taken—Power to vary Tolls.*] A pier company were authorized by Act of Parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the Act, but they could only demand them so long as "the rates for the time being authorized to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent section power was given to lower the tolls or to raise them to such sums as the company should think proper, not exceeding the sums authorized by the Act. The company lowered some of the rates, but put up a board shewing the tolls contained in the schedule to the Act:—*Held*, that the Act required the actual tolls in force for the time being, and not the maximum tolls authorized by the Act, to be painted on the board. GREGSON *v.* POTTER - - - - - 142

POST OFFICE—Letter of allotment posted but not received - - - 216
See COMPANY. 1.

PRACTICE—*Administration Suit in County Court—Staying Actions in High Court—County Court Act*, 1865 (28 & 29 *Vict. c.* 99), *s.* 1—*County Court Rules*, 1875, *Order II.—Judicature Act*, 1873, *s.* 24, *sub-s.* 5, *ss.* 89, 91.] Since the Judicature Act, 1873, a county court before which an administration suit is pending has no power to stay proceedings in the High Court, in respect of claims proveable in the administration suit. COBBOLD *v.* PRYKE - - - - - 315

2. —— *Appeal — Misdirection — New Trial—Appeal against Judgment at Trial with Jury—Jurisdiction of Court of Appeal—Rules of the Supreme Court, Order XXXIX., rule* 1, *Order XL., rule* 4.] During the trial of an action before a jury the judge was asked by the defendants' counsel to nonsuit the plaintiffs, or to direct a finding for the defendants, upon the ground that no evidence had been given in support of the plaintiff's case; this the judge refused to do, and the jury found the issue left to them in favour of the plaintiffs. Upon the following day the judge directed judgment to be entered for the plaintiffs, and stated his reasons for holding that there was evidence to support the finding of the jury. The defendants appealed to the Court of Appeal against the judgment directed to be entered:—*Held*, that the appeal would not lie; for the judgment was upon the face of it correct, so long as the finding stood unreversed, and the Court of Appeal has no power, in the first instance, to review the finding of a jury; and the defendants' ground of complaint being for misdirection, they ought to have applied to the Exchequer Division for a new trial under Order XXXIX., rule 1.—*Yetts* v. *Foster* 3 C. P. D, 437) followed. DAVIES *v.* FELIX [C. A. 32

3. —— *Appeal—Time for appealing—Appeal from Order made at Chambers during Long Vacation to Divisional Court — Rules of Court, Order LIV., rule* 6—*Order empowering Plaintiff to sign Judgment upon specially indorsed Writ.*] Order LIV., rule 6, which directs that an appeal from a decision at chambers shall be made within eight days, applies to decisions at chambers during the Long Vacation; and if that period has elapsed without the sitting of a Divisional Court, the right to appeal is lost, unless the party decided against obtains an extension of time.—An order empowering the plaintiff to sign judgment upon a

PRACTICE—*continued.*

specially indorsed writ, was made by a judge at chambers upon the 29th of August: the time for appealing to a Divisional Court was, on the 2nd of September, extended conditionally upon payment into Court of the sum sued for within fourteen days; this condition was never fulfilled, and no Divisional Court sat during the Long Vacation. Upon the first day of Michaelmas Sittings, the defendant moved the Exchequer Division to set aside the order made upon the 29th of August:—*Held*, affirming the decision of the Exchequer Division, that as more than eight days had elapsed since the order was made, no appeal could lie. RUNTZ *v.* SHEFFIELD - - - C. A. 150

4. —— *Appeal by Motion from Inferior Court—Time for entering Appeal—Rules of Court, Order LVIII., rules* 8 *and* 19.] Where a rule is obtained on a motion by way of appeal from an inferior Court, the appeal must be entered in the list at the Crown Office of the Queen's Bench Division under Order LVIII., rule 19, before the day mentioned in the notice to shew cause. DONOVAN *v.* BROWN - - - 148

5. —— *Costs of Action up to and after Payment into Court—Rules of Court, Order XXX., rule* 1.—*Order LV., rule* 1.] In an action for damages for breach of covenant the defendant denied the breach, and also paid money into court, alleging that it was enough to satisfy the claim. The plaintiff replied joining issue. alleging that the money was not enough, and the issues having been referred to an official referee, he reported that the money paid in was enough to satisfy the claim:—*Held*, that the costs were in the discretion of the Court under Order LV., rule 1, and that the discretion in such cases ought to be exercised by allowing the plaintiff his costs of the action up to the time of payment into court, and allowing the defendant his costs of the action after that time.—*Langridge* v. *Campbell* (2 Ex. D. 281) discussed. BUCKTON *v.* HIGGS 174

6. —— *Costs—Claim exceeding* 50*l.—Recovery of less than* 20*l. in Contract—Counter-claim and Set-off—County Courts Act*, 1867, *s.* 5—*Judicature Act*, 1873, *s.* 67.] The plaintiffs claimed on a balance of accounts a sum of money exceeding 50*l.* The defendants denied their indebtedness, and pleaded by way of set-off and counter-claim that the plaintiffs were indebted to them for money advanced and money due for work done, and goods sold and delivered, and they claimed a balance on the accounts in their favour exceeding 50*l.* The cause was referred to an arbitrator, costs to abide the event. The arbitrator found that the defendants were indebted to the plaintiffs in a sum exceeding 50*l.*, and that the plaintiffs were indebted in like manner to the defendants in a sum exceeding 50*l.*, but that a balance was due to the plaintiffs on the whole account of 11*l.* 10*s.* 3*d.*:—*Held*, by Kelly, C.B., that the plaintiffs and the defendants were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county court; and by Hawkins, J., contrary to his opinion, but on the authority of *Potter* v. *Chambers* (4 C. P. D. 457), that the plaintiffs were entitled to their general costs of action. NEALE *v.* CLARKE - - 286

PRACTICE—*continued.*

7. —— *Costs—Rules of Court, Order LV.—Jurisdiction of Divisional Court to entertain an Application for Costs after Trial.*] The Divisional Court has under Order LV. an original jurisdiction to make an order to deprive a successful party of the costs of an action tried before a jury.—The decisions of the Queen's Bench Division and Exchequer Division affirmed. MYERS *v.* DEFRIES. SIDDONS *v.* LAWRENCE - C. A. 176

8. —— *Costs—Taxation—Reference—Shorthand Writers' Notes—Brief Copies for Counsel—Rules of the Supreme Court (Costs).*] Where an action is referred, the cost of brief copies of the transcript of shorthand writers' notes of each day's proceedings in the reference, made for the use of counsel, will not, in the absence of any order and of agreement between the parties, be allowed on taxation.—*Croomes* v. *Gore* (1 H. & N. 14) followed. WELLS *v.* MITCHAM GAS LIGHT COMPANY - - - - - 1

9. —— *Costs—Reference and Award—Reference by Consent—Costs of Award in Discretion of Arbitrator—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 5.] When an action is referred by consent to arbitration upon the terms that the costs of the cause shall abide the event, and the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiff he may lawfully direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause under the County Courts Act, 1867, s. 5.—*Quære*, whether *Moore* v. *Watson* (Law Rep. 2 C. P. 314) was correctly decided. GALATTI *v.* WAKEFIELD - - - - C. A. 249

10. —— *Costs of Third Party—Power of Court to alter Direction previously given as to Costs.*] The Court has no power to annul a direction in a judgment previously delivered, that a third party shall pay the costs of the interlocutory proceedings taken to bring him before the Court, although by the judgment in the action it is ordered that he be dismissed from the action with costs to be paid by the defendants. BEYNON *v.* GODDEN [C. A. 246

11. —— *Crown, Prerogative of the—Right of Sovereign to Injunction to restrain Action—Jurisdiction of Exchequer Division in Matters affecting Revenue—Judicature Act*, 1873, *s.* 24, *sub-s.* 5, *s.* 34—*Rules of Court, Order LXII.*] The prerogative of the Crown to intervene in actions affecting the rights or revenue of the Sovereign has not been affected by the Judicature Acts; and for the determination of such matters the Exchequer Division of the High Court of Justice has all the powers formerly possessed by the Court of Exchequer. ATTORNEY GENERAL *v.* CONSTABLE - - - - - 173

12. —— *Discovery of Documents—Documents protected from production by reason of Privilege—Privilege—Affidavit as to Documents, Sufficiency of—Rules of Supreme Court, Order XXXI., rule* 13.] An affidavit as to documents by a party who objects to produce them is insufficient, if it merely states "that the documents are privileged;" it ought to state and verify the facts upon which the objection is grounded. GARDNER *v.* IRVIN [C. A. 49

PRACTICE—*continued.*

13. —— *Discovery after Claim and before Defence—Rules: Order XXXI., rule* 12.] A plaintiff after delivering a statement of claim is not, as a general rule, entitled, under Order XXXI., rule 12, of the Rules of the Supreme Court, to an order for discovery of documents before a statement of defence is delivered, because, until that happens, it is impossible to say what the matters "in question in the action" are. HANCOCK *v.* GUERIN - - - - - - 3

14. —— *Executor—Residuary Legatee—Action by Creditor of Testator—Non-joinder of Executor as Defendant—Rules of Court, Order XVI., rule* 7.] In an action against Y. and A., his wife, the claim alleged that W. owed the plaintiff 40*l.*, and that at his death he appointed by his will M. W. his residuary legatee; that M. W. died, having by her will appointed A., the female defendant, her residuary legatee: that the residuary estate of W. had been assigned by his surviving executor to the defendants. The plaintiff claimed payment of 40*l.* from the defendants, but the surviving executor of W. was not made a party to the action:—*Held*, upon demurrer, that the claim disclosed a good cause of action; for even if the practice of the Court of Chancery would have required the surviving executor of W. to be joined as a defendant, the proper course (since the passing of the Judicature Acts, 1873, 1875) for the defendants to take, if they wished to bring him before the Court, was to make him a party to the action under Rules of the Supreme Court, Order XVI., rule 17.—*Clegg* v. *Rowland* (Law Rep. 3 Eq. 368) commented upon and approved of. HUNTER *v.* YOUNG - C. A. 256

15. —— *New Trial—Action remitted to County Court—Rules of Court, Order XXXIX., rule* 1—19 *&* 20 *Vict. c.* 108, *s.* 26.] In an action commenced in a Divisional Court, and remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, and tried by a judge without a jury, an application for a new trial must be made to a Divisional Court, and not to the Court of Appeal. —*London* v. *Roffey* (3 Q. B. D. 6) approved. DAVIS *v.* GODBEHERE - - - C. A. 215

16. —— *Rules of Court, Order XIV.—Goods received "upon Sale or Return"—Effect of staying Proceedings upon Debtor's Summons for same Debt.*] The defendant received from the plaintiff jewelry "upon sale or return;" the defendant delivered it to a woman who, without his authority, pledged it, and he was unable to recover it. The plaintiff thereupon issued a debtor's summons against the defendant for the price of the jewelry; but proceedings upon it were stayed without calling upon the defendant to give security for the amount claimed. The plaintiff did not appeal from the decision upon the debtor's summons. Subsequently the present action was commenced with a specially indorsed writ, and a master directed under Rules of the Supreme Court, Order XIV., that the plaintiff should be at liberty to sign judgment, unless the defendant paid into court the amount claimed within four days:—*Held*, that the order of the master could not be set aside; for although, as the plaintiff had not appealed against the decision upon the debtor's summons, it might have been better to refuse to entertain an application

PRACTICE—*continued.*

under Order XIV., yet the plaintiff was otherwise entitled to sign judgment unless the condition imposed should be complied with, the defendant not setting up a clear defence upon the merits.—*Moss* v. *Sweet* (16 Q. B. 493; 20 L. J. (Q.B.) 167) commented on. RAY *v.* BARKER - C. A. 279

17. —— *Rules of Court, Order XIV., rule* 1—*Writ specially Indorsed—Corporation Defendants.*] Where a writ is specially indorsed under Order III., rule 6, the plaintiff may apply for judgment under Order XIV., rule 1, though the defendants are a corporation. SHELFORD *v.* LOUTH AND EAST COAST RAILWAY COMPANY - - - C. A. 317

18. —— *Specially indorsed Writ—Leave to Defend as to Part of Claim where Writ specially Indorsed—Rules of Court, Order XIV., rule* 4.] When upon shewing cause against an application for leave to sign final judgment under Order XIV., the defendant's affidavit admits part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power under rule 4 to require the defendant to pay to the plaintiff the amount admitted to be due as a condition of being allowed to defend as to the residue. The proper order is that the plaintiff have judgment for the amount admitted; the defendant to be at liberty to defend as to the residue. DENNIS *v.* SEYMOUR [80

—— County court—Sending case to—Claim of 50*l.* and interest - - - 16
See COUNTY COURT. 2.

PRINCIPAL AND AGENT — Ship's husband, authority of, to bind owner by cancelling charterparty - - - 18
See SHIP. 5.

—— Unqualified signature of charterparty 104
See SHIP. 5.

PRINCIPAL AND SURETY—*Discharge of Surety—Subsequent Legislation affecting Indemnity—Effect on Liability of Surety—Abandonmen of Railways Act*, 1850 (13 *&* 14 *Vict. c.* 83), *s.* 31—*Railway Companies Act*, 1867 (30 *&* 31 *Vict. c.* 127), *ss.* 31, 32.] The plaintiff gave a bond to the Crown conditional to be void if a certain railway was completed within a given time, and the defendants undertook to indemnify the plaintiff against all liability which he might incur in giving such bond. The railway was not completed, and the plaintiff, under the Railway Companies Act, 1867, which was passed after the giving of the bond, applied to the Board of Trade to authorize the abandonment of the railway and to cancel the bond, which was ordered upon condition that the money secured by it should be applied as assets of the company. The company was accordingly wound up, and the plaintiff paid, under an order of the Court, a part of the money secured by the bond, which was then cancelled. The plaintiff brought an action to recover the amount so paid from the defendants on their undertaking to indemnify. On demurrer to the statement of claim:—*Held*, that the payment made by the plaintiff to obtain the cancelling of the bond was a liability incurred by him in giving the bond, for which the defendants were liable to indemnify him, although the Railway Companies Act, 1867, enabling the plaintiff to take proceedings

SHIP—*continued.*

above-mentioned, there was no obligation upon the defendants to provide one lighter for unloading the cargo of the *C.* for every working day after she was ready to unload, and that if the defendants had used the existing appliances at L. with due despatch, according to the custom of the port, the jury ought to find for them:—*Held*, by Brett and Thesiger, L.JJ., affirming the decision of the Exchequer Division, Cotton, L.J., dissenting, that the direction was correct. POSTLETHWAITE *v.* FREELAND - - C. A. 155

4. —— *Ship's Husband, Authority of, to bind Owner by Cancelling Charterparty.*] A ship's husband, who has the authority of the owners of the ship to enter into a charterparty, and has accordingly made a charterparty by which commission on the freight, primage, and demurrage is stipulated to be due to the charterers on the execution of the charterparty, has not, without the express sanction of the owners, power to bind them by an agreement to cancel the charterparty and pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners. THOMAS *v.* LEWIS - - 18

5. —— *Principal and Agent—Charterparty—Description of Person signing as Agent for Charterers—Unqualified Signature—Liability as Principal.*] A charterparty was entered into between plaintiffs, shipowners, and defendants "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading and payment of advance. In an action for breach of the charterparty, the defendants by their statement of defence denied their personal liability:—*Held*, on demurrer, that the defendants were liable on the charterparty. HOUGH *v.* MANZANOS - - - - 104

SHORTHAND NOTES—Costs of - - 1
See PRACTICE. 8.

SLATE—Obtained by underground workings—Income tax - - - - 97
See REVENUE. 2.

SOLICITOR—Contempt—Default in payment of money as officer of court—Detention for more than one year - - 73
See GAOLER.

STAMP—Transfer or assignment of mortgage 270
See REVENUE. 3.

STATUTE—Construction of—Exercise of powers discretionary or compulsory - 116
See RIVER.

STATUTES:

21 Geo. 3, c. 4 - - - - 107
See PENALTY.

48 Geo. 3, c. 55, sched. B. - - 100
See REVENUE. 1.

5 & 6 Vict. c. 35, s. 60, sched. A. - 97
See REVENUE. 2.

13 & 14 Vict. c. 83, ss. 31, 32 - - 127
See PRINCIPAL AND SURETY.

STATUTES—*continued.*

14 & 15 Vict. c. 36 - - - - 100
See REVENUE. 1.

17 & 18 Vict. c. 36, ss. 1, 7 - - 59
See BILL OF SALE.

17 & 18 Vict. c. 112, ss. 30, 33 - - 54
See WILL.

18 & 19 Vict. c. 120, ss. 2, 54 - - 307
See METROPOLIS MANAGEMENT ACTS. 1.

19 & 20 Vict. c. 108, s. 26 - - - 215
See PRACTICE. 15.

23 & 24 Vict. c. 34, s. 7 - - - 252
See PETITION OF RIGHT.

25 & 26 Vict. c. 102, s. 77 - - - 239
See METROPOLIS MANAGEMENT ACTS. 2.

28 & 29 Vict. c. 99, s. 1 - - - 315
See PRACTICE. 1.

30 & 31 Vict. c. 127, ss. 31, 32 - - 127
See PRINCIPAL AND SURETY.

30 & 31 Vict. c. 142, s. 5 - - - 249
See PRACTICE. 9.

—— —— s. 7 - - - - 16
See COUNTY COURT.

32 & 33 Vict. c. 62, s. 4 - - - 73
See GAOLER.

32 & 33 Vict. 71, s. 49 - - - 26
See BANKRUPTCY.

33 & 34 Vict. c. 35, ss. 2, 3, 4 - - 94
See LANDLORD AND TENANT.

33 & 34 Vict. c. 52, s. 8 - - - 63
See CRIMINAL LAW.

33 & 34 Vict. c. 97, s. 109 - - 279
See REVENUE. 3.

35 & 36 Vict. c. 76, s. 18 - - - 13
See MINE.

36 & 37 Vict. c. 60, s. 1 - - - 63
See CRIMINAL LAW.

36 & 37 Vict. c. 66, s. 25 - - - 37
See MORTGAGE.

38 & 39 Vict. 55, s. 114 - - - 302
See LOCAL GOVERNMENT ACTS.

STAY OF PROCEEDINGS—By county court—Action in High Court - - 315
See PRACTICE. 1.

SUNDAY OBSERVANCE—*Penalty, Action for—Judgment recovered for same Offence—Covin and Collusion*—21 *Geo.* 3, *c.* 49.] The defendants pleaded in bar to an action to recover a penalty for breach of 21 Geo. 3, c. 49, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants and without the interference of R.: it was commenced for the protection of the defendants from any action brought or to be brought in respect of the penalty claimed in it; and also for the purpose of taking the Home Secretary's opinion whether he would remit the penalty:—*Held*, affirming the judgment of the Exchequer Division, that the judgment recovered was no bar to an action for the same offence by a different plaintiff.—By Brett, L.J., on the ground that the judgment had been recovered in an action in

SUNDAY OBSERVANCE—*continued.*
which the present defendants were, in truth, both plaintiffs and defendants.—By Thesiger, L.J., on the ground that the judgment had been obtained by covin and collusion.—By Cotton, L.J., on both grounds. GIBDLESTONE *v.* BRIGHTON AQUARIUM COMPANY - - - - C. A. 107

SURETY—Discharge of - - -
See PRINCIPAL AND SURETY.

TIME — For appealing — Order at Chambers during Long Vacation - - 150
See PRACTICE. 3.

—— For entering appeal from inferior Court 148
See PRACTICE. 4.

TOLL—Pier company—Notice of rate authorized to be taken - - - - 142
See PIER COMPANY.

TREE—Injury to cattle from poisonous tree on neighbour's land - - - 5
See NUISANCE.

TRUSTEES—Unpaid—Public purposes—Liability
See RIVER. [107

VENDOR AND PURCHASER—*Contract of Sale—Agreement by Vendor to discharge all "Outgoings" before the Completion of the Purchase—Charge upon Houses for Improvement of Street.*] The plaintiffs bought of the defendant three houses, and by the contract of sale the latter agreed to discharge "all rates, taxes, and outgoings" up to the time of completion. The purchase was completed, and afterwards payment was demanded from the plaintiffs of the expenses incurred under a local Act in improving the street in which the houses stood. The work had been done some time before the houses belonged to the defendant, and at the time of sale to the plaintiffs neither party was aware of the charge. The plaintiffs, having paid the sum demanded, sued to recover the same from the defendant:—*Held*, that the charge for improving the street was an "outgoing" which the defendant had bound himself to discharge, and that the plaintiffs were entitled to recover it from him. MIDGLEY *v.* COPPOCK [C. A. 309

—— Right to dividends declared before completion of sale of shares - - 24
See COMPANY. 2.

VESTRY—Churchwarden—How far member of—Metropolis - - - - 307
See METROPOLIS MANAGEMENT ACTS. 1.

VIS MAJOR—Overflow of water from defendants' to plaintiff's land - - - 76
See WATER.

WARRANT—Extradition—Description of offence
See CRIMINAL LAW—EXTRADITION. [63

WATER—*Storage of—Overflow from Defendants' to Plaintiff's Land—Vis Major.*] The defendants possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and so cause an overflow thence on to the plaintiff's land. In an action for damage caused thereby it was shewn that the defendants had no control over the main drain, or the other reservoir, or knowledge of the circumstances which caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances:—*Held*, that the defendants were not liable. BOX *v.* JUBB - - - - - - 76

WILL—*Perpetuity—Gift to Building Fund of Mechanics Institution—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33.] An Athenæum and Mechanics Institution was established and kept on foot by the subscriptions of certain inhabitants of Tunstall, for the purpose of providing a lending and reference library and a reading room for the use of members. By one of the rules all the property of the institution was vested in the trustees for the time being; and by another rule the society was not to be dissolved unless by resolution of nine-tenths of the members present at a specially convened general meeting, confirmed by a similar resolution at a second meeting. A sinking fund had been established to pay off a mortgage debt on the building occupied, which was the property of the institution. A bequest was made of a sum of money to the trustees for the time being of the institution, to be applied towards "the building fund in connection therewith:"—*Held*, that the bequest was void as tending to a perpetuity. *Re* DUTTON - 54

WORDS—"Crimes against bankruptcy law" 63
See CRIMINAL LAW.

—— "New street" - - - - 239
See METROPOLIS MANAGEMENT ACTS. 1.

—— "Outgoing" - - - - 309
See VENDOR AND PURCHASER.

WRIT—Specially indorsed - - 80, 317
See PRACTICE. 17, 18.

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13

12

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